Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	
Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding	Docket No. 2006-3 CRB DPRA

THE WRITTEN DIRECT STATEMENT, WITNESS STATEMENTS & EXHIBITS OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC., THE SONGWRITERS GUILD OF AMERICA, AND THE NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL

VOLUME V

EXHIBIT CO 0501

WILLIAM M. LANDES **October 2005**
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EDUCATION

Ph.D., COLUMBIA UNIVERSITY: Economics, 1966

B.A., COLUMBIA UNIVERSITY: 1960

ACADEMIC EMPLOYMENT

THE UNIVERSITY OF CHICAGO, The Law School: Clifton R. Musser Professor of Law & Economics (7/92-present); Clifton R. Musser Professor of Economics (7/80-7/92); Professor of Economics (1/74-6/80).

FORDHAM UNIVERSITY, School of Law: 19967 Bacon-Kilkenny Chair of Law for a Distinguished Visiting Professor, 8/96–12/96.

NATIONAL BUREAU OF ECONOMIC RESEARCH, INC.: Research Staff (1973-1979); Research Associate (1969-1973); Research Fellow (1968-1969); Research Assistant (1962 - 1963).

CITY UNIVERSITY OF NEW YORK, Graduate Center (1972 - 1974): Associate Professor of Economics.

COLUMBIA UNIVERSITY (1969 - 1972): Associate Professor of Economics.

THE UNIVERSITY OF CHICAGO (1966 - 1969): Assistant Professor of Economics.

STANFORD UNIVERSITY (1965 - 1966): Assistant Professor of Economics

AREAS OF SPECIALIZATION

Economic Analysis of Law
Intellectual Property
Art Law
Industrial Organization
Antitrust

ACADEMIC HONORS AND FELLOWSHIPS

President's Fellowship, Columbia University, 1962-1963.
Ford Foundation Doctoral Dissertation Fellowship, 1963-1964.
I.B.M. Watson Fellowship, 1964-1965.
Ansley Award Nomination, Economics Department, Columbia University, 1956.

PROFESSIONAL AFFILIATIONS

Member, American Economic Association
Editorial Board, *Journal of Cultural Economics*, 2003-
Editor, *The Journal of Law and Economics*, 1975-1991,
The Journal of Legal Studies, 1991-2000
Member, Panel on Legislative Impact on the Courts, National Academy of Sciences, 1977-1979
Member, Mont Pelerin Society
Research Advisory Committee, U.S. Sentencing Commission, 1986-88
Adviser, Restatement of the Law, Third, Unfair Competition
Council of Economic Advisers, American Enterprise Institute
Board of Editors, Intellectual Property Fraud Reporter
Member, Scientific Committee of A Bibliography of Law and Economics with abstracts of the European, non-English literature, Ruiksuniversiteit-Gent, Belgium, 1990
Member, Committee of Patronage of the Erasmus Project in Law and Economics, Ruiksuniversiteit-Gent, Belgium, 1990
Member, Academic Advisory Council, The Locke Institute, 1990-
Member, American Law and Economics Association,
Executive Vice President, 1991 - 1992
President, 1992 - 1993
Advisory Board, Law and Economics Abstracts, 1996 -

PUBLICATIONS

BOOKS AND MONOGRAPHS

Essays in the Economics of Crime and Punishment, edited with Gary S. Becker, National Bureau of Economic Research (1974).

The Economic Structure of Tort Law, co-authored with Richard A. Posner, Harvard Univ. Press (1987).

The Economic Structure of Intellectual Property Law, co-authored with Richard A. Posner, Harvard Univ. Press (2003).

RESEARCH PAPERS

"The Effect of State Fair Employment Law on the Economic Position of Non-Whites," Papers and Proceedings of the *American Economic Review*, Vol. LV III (May 1967).

"The Economics of Fair Employment Laws," 76(4) *Journal of Political Economy* (July/August 1968).

"Roundtable on the Allocation of Resources to Law Enforcement," Papers and Proceedings of the *American Economic Review*, Vol. LIX (May 1969).

"An Economic Analysis of the Courts," 14 *Journal of Law and Economics* (April 1971). Reprinted in Becker and Landes, Essays in the Economics of Crime and Punishment (1974).

"Law and Economics," National Bureau of Economic Research--51st Annual Report (September 1971).

"Compulsory Schooling Legislation: An Economic Analysis of Law and Social Change in the Nineteenth Century," *Journal of Economic History* (March 1972), co-authored with Lewis Solomon.

"The Bail System: An Economic Approach," *Journal of Legal Studies* (January 1973). Reprinted in Becker and Landes, Essays in the Economics of Crime and Punishment (1974).

"Foreign Criminal Procedure: A Comment," The Economics of Crime and Punishment, conference volume of the American Enterprise Institute for Public Policy Research (1973).

"Legality and Reality: Some Evidence on Criminal Procedure," *Journal of Legal Studies* (June 1974).

"The Private Enforcement of Law," *Journal of Legal Studies* (January 1975), co-authored with Richard A. Posner.

"The Independent Judiciary in an Interest Group Perspective," (Universities-National Bureau Conference on Economic Analysis of Political Behavior) *Journal of Law and Economics* (December 1976), co-authored with Richard A. Posner.

"Legal Precedent: A Theoretical and Empirical Analysis," *Journal of Law and Economics* (September 1976), co-authored with Richard A. Posner.

"Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism," *Journal of Legal Studies* (January 1978), co-authored with Richard A. Posner.

"Should We Tax Virgin Materials to Finance Waste Disposal?" Waste Age (March 1978), co-authored with Richard A. Posner.

"An Economic Study of U.S. Aircraft Hijacking, 1961-1976," *Journal of Law and Economics* (April 1978).

"Altruism in Law and Economics," Papers and Proceedings of the *American Economic Review* (May 1978), co-authored with Richard A. Posner.

"Adjudication as a Private Good," *Journal of Legal Studies* (March 1979), co-authored with Richard A. Posner.

"Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?" An Economics Analysis of the Rule of Illinois Brick," *University of Chicago Law Review* (Spring 1979), co-authored with Richard A. Posner.

"Benefits and Costs of Airline Mergers: A Case Study," *The Bell Journal of Economics* (Spring, 1980), co-authored with Dennis W. Carlton and Richard A. Posner.

"Legal Change, Judicial Behavior and the Diversity Jurisdiction," *Journal of Legal Studies* (March 1980), co-authored with Richard A. Posner.

"Joint and Multiple Tortfeasors: An Economic Analysis," *Journal of Legal Studies* (June 1980), co-authored with Richard A. Posner.

"The Economics of Passing On: A Reply to Harris and Sullivan," *University of Pennsylvania Law Review* (May 1980), co-authored with Richard A. Posner.

"Contribution Among Antitrust Defendants: A Legal and Economic Analysis," *Journal of Law and Economics* (October 1980), co-authored with Frank H. Easterbrook and Richard A. Posner.

"An Introduction to the Economics of Antitrust," an appendix in Richard A. Posner and Frank H. Easterbrook, Antitrust: Cases, Economic Notes and Other Materials (West, 2d ed. 1980).

"Market Power in Antitrust Cases," *Harvard Law Review* (March 1981), co-authored with Richard A. Posner.

"The Positive Economic Theory of Tort Law," *Georgia Law Review* (Summer 1981) co-authored with Richard A. Posner.

"An Economic Theory of Intentional Torts," *International Review of Law and Economics* (December 1981) co-authored with Richard A. Posner.

"Causation in Tort Law: An Economic Approach," *Journal of Legal Studies* (January 1983) co-authored with Richard A. Posner.

"Optimal Sanctions for Antitrust Violations," *University of Chicago Law Review* (Spring 1983). Reprinted in 26 The Journal of Reprints for Antitrust Law and Economics, 79 (1996).

"Harm to Competition: Cartels, Mergers and Joint Ventures," 52 *Antitrust Law Journal* Vol. 3. Reprinted in Antitrust Policy in Transition: The Convergence of Law and Economics (E. Fox and J. Halverson, eds.), American Bar Assn. (1984).

"Tort Law as a Regulatory Regime for Catastrophic Personal Injuries," *Journal of Legal Studies* (August 1984) co-authored with Richard A. Posner.

"A Positive Economic Analysis of Products Liability," *Journal of Legal Studies* (December 1985) co-authored with Richard A. Posner.

"New Light on Punitive Damages" Regulation, (Sept./Oct. 1986), co-authored with Richard A. Posner.

"Trademark Law: An Economic Perspective," *Journal of Law and Economics* (October 1987), co-authored with Richard A. Posner. Reprinted in the *Intellectual Property Review* (1988).

"The Economics of Trademark Law," Trademark Reporter, (May/June 1988), co-authored with Richard A. Posner.

Review of "The Firm, The Market and The Law" by Ronald Coase," University of Chicago Law School Record, (Fall 1988).

"An Economic Analysis of Copyright Law," *Journal of Legal Studies*, (June 1989), co-authored with Richard A. Posner.

"Insolvency and Joint Torts: A Comment," *Journal of Legal Studies* (June 1990).

"Some Economics of Trade Secret Law," *Journal of Economic Perspectives,* (Winter, 1991) co-authored with David Friedman and Richard A. Posner.

"Copyright Protection of Letters, Diaries and Other Unpublished Works: An Economic Approach," *Journal of Legal Studies* (January 1992).

"Sequential and Unitary Trials: An Economic Approach," *Journal of Legal Studies* (January, 1993).

"The Influence of Economics on Law: A Quantitative Study," *Journal of Law and Economics* (April 1993) co-authored with Richard A. Posner.

"The Economics of Anticipatory Adjudication," *Journal of Legal Studies* (June 1994) co-authored with Richard A. Posner.

"Counterclaims: An Economic Analysis," *International Review of Law & Economics* (Sept. 1994).

"Heavily Cited Articles in Law," 7 *Kent Law Review* No. 3 (1996) co-authored with Richard A. Posner.

"The Economics of Legal Disputes Over The Ownership of Works of Art and Other Collectibles, " in Essays in the Economics of the Arts (ed. by V. A. Ginsburgh & P.-M. Menger) (Elsevier Science, 1996) co-authored with Richard A. Posner.

"The Art of Law and Economics: An Autobiographical Essay," 41 *The American Economist*, No. 1 (Spring 1997) and to be reprinted in "Passion and Craft, Economists at Work," Michael Szenberg, ed. (Ann Arbor: Michigan University Press, forthcoming 1998)

"Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges," *Journal of Legal Studies* (June 1998) co-authored with Lawrence Lessig and Michael Solimine.

"Sequential and Bifurcated Trials" entry in The New Palgrave Dictionary of Economics and the Law (1998).

"Gary S. Becker Biography" entry in The New Palgrave Dictionary of Economics and the Law (1998).

"Citations, Age, Fame and the Web," *Journal of Legal Studies* (January 2000) co-authored with Richard A. Posner

"Introduction to Interpreting Legal Citations," *Journal of Legal Studies* (January 2000)

"Winning the Art Lottery: The Economic Returns to the Ganz Collection," Recherches Economiques de Louvain, *Louvain Economic Review* (Vol. 66(2) 2000)

"Harmless Error," *Journal of Legal Studies* (January 2001) co-authored with Richard A. Posner

"Copyright, Borrowed Images and Appropriation Art: An Economic Approach," *George Mason Law Review* (Fall 200)

"The Social Market for the Great Masters and Other Collectibles" with Gary S. Becker and Kevin M. Murphy in Social Economics: Market Behavior in a Social Environment Harvard Univ. Press (2000)

"What Has the Visual Artist's Rights Act of 1990 Accomplished?" *Journal of Cultural Economics* (November 2001)

"Copyright" in A Handbook of Cultural Economics ed by Ruth Towse (Edward Elger 2003)

"Indefinitely Renewable Copyright" in *University of Chicago Law Review* (Spring 2003) co-authored with Richard A. Posner

"The Empirical Side of Law and Economics," *University of Chicago Law Review* (Winter 2003)

"Indirect Liability for Copyright Infringement: Napster and Beyond" in *Journal of Econ. Perspectives* (Spring 2003) co-authored with Douglas Lichtman

"Indirect Liability for Copyright Infringement: An Economic Perspective," *Harvard Journal of Law & Technology* (Spring 2003) co-authored with Douglas Lichtman

"The Test of Time: Does 20th Century American Art Survive?" in Contributions to Economic Analysis: The Economics of Art and Culture ed. by Victor Ginsburgh (Elsevier Science, 2004)

"An Empirical Analysis of the Patent Court," *University of Chicago Law Review* (Winter 2004) co-authored with Richard A. Posner

The Political Economy of Intellectual Property Law American Enterprise Institute-Brookings Joint Center for Regulatory Studies (2004) with Richard A. Posner

TESTIMONIAL EXPERIENCE SINCE 1999

Trial testimony of William M. Landes in *Blue Cross and Blue Shield Association v. American Express Company,* U.S. District Court Northern District of Illinois Eastern Division, No. 99 C 6679 (August 26, 2005).

Expert Report of William M. Landes in *Blue Cross and Blue Shield Association v. American Express Company*, U.S. District Court for the Northern District of Illinois, Eastern Division, No. 99 C 6679 (March 21, 2005).

Deposition of William M. Landes in *Cellco Partnership d/b/a Verizon Wireless v. Nextel Communications Inc.*, U.S. District Court District of Delaware, Civ. 03-725-KAJ (August 18, 2004) (Confidential)

Expert Report of William M. Landes in *Cellco Partnership d/b/a Verizon Wireless v. Nextel Communications Inc.*, June 15, 2004

Expert Report of William M. Landes in *Six West Retail Acquisition, Inc., v. Sony Theatre Management Corporation, et al.,* United States District Court Southern District of New York, 97 Civ. 5499 (LAP) (JCF) (February 6, 2003) (Confidential)

Deposition of William M. Landes in Re: *Vitamin Antitrust Litigation*, in the United States District Court of the District of Columbia, M.D.L. No. 1285, Misc. No. 99-0197 (TFH). (August 5-7, 2002)

Reply Expert Report of William M. Landes, Hal Sider and Gustavo Bamberger in Re: *Vitamin Antitrust Litigation,* in the United States District Court for the District of Columbia, M.D.L. No. 1285, Misc. No. 99-0197 (TFH). (July 17, 2002)

Expert Report of William M. Landes, Hal Sider and Gustavo Bamberger in Re: *Vitamin Antitrust Litigation,* in the United States District Court for the District of Columbia, M.D.L. No. 1285, Misc. No. 99-0197 (TFH). (May 23, 2002)

Declaration of William M. Landes and Hal S. Sider in Re: *Auction Houses Antitrust Litigation,* in the United States District Court, Southern District of New York, No. 00 Civ. 0648(LAK). (February 1, 2001)

Report of William M. Landes in Re: *Calvin Klein Trademark Trust and Calvin Klein Inc., v. The Warnaco Group Inc. et al.,* Civ. No. 00-4052(JST). (December 1, 2000)

Declaration of William M. Landes and Hal Sider in Re: *Vitamin Antitrust Litigation,* in the United States District Court for the District of Columbia, M.D.L. No. 1285, Misc. No. 99-0197 (TFH). (June, 2000)

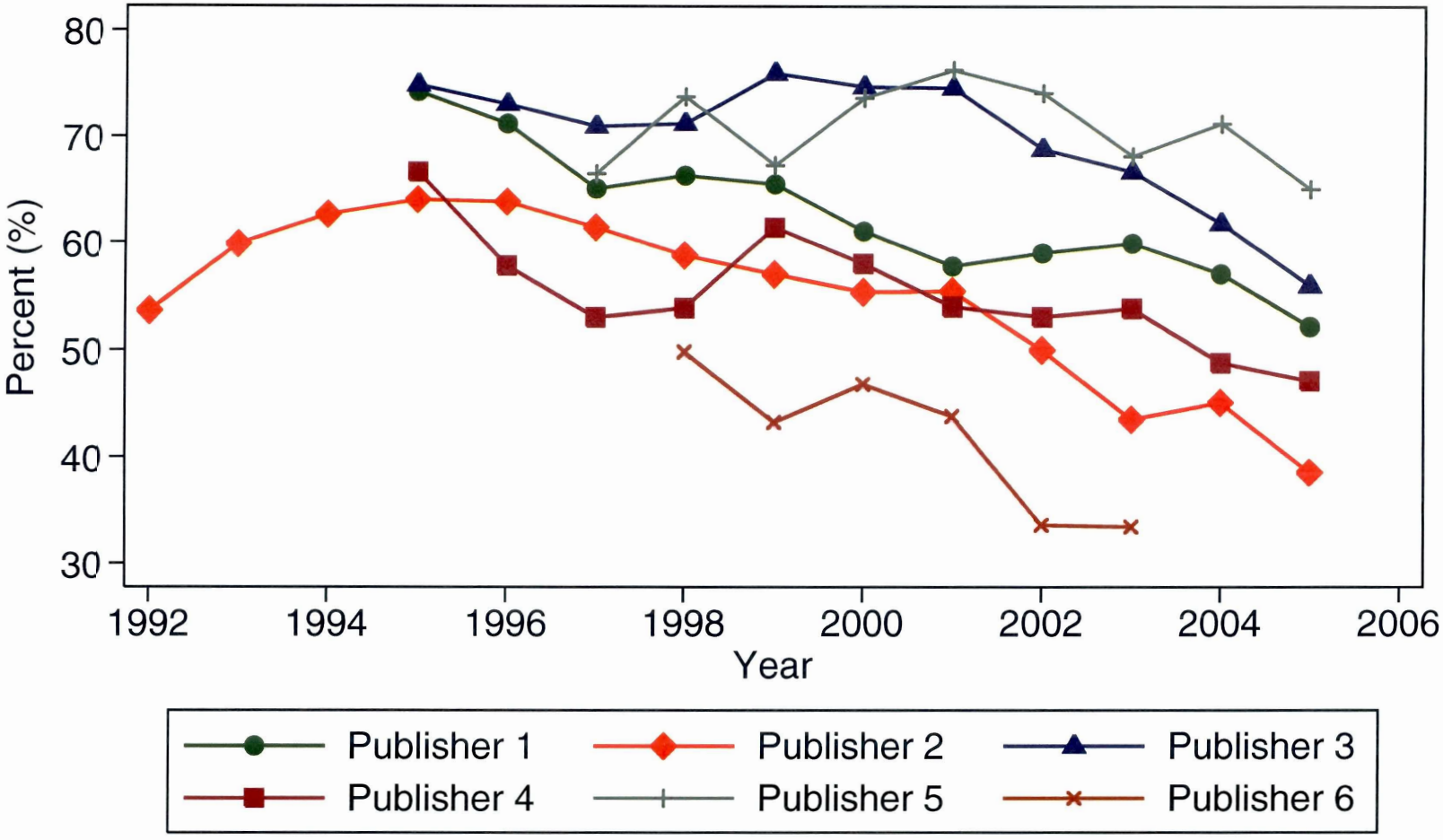
Declaration of William M. Landes in Re: *Vitamin Antitrust Litigation,* in the United States District of Columbia, M.D.L. No. 1285, Misc. No. 99-0197 (TFH). (November 11, 1999)

Affidavit of William M. Landes in Re: *The City of New York, The New York City Housing Authority, and The New York Health and Hospitals Corporation v. Lead Industries Association, Inc., et al.* Index No. 14365/89, IAS Part 39, before the Supreme Court of the States of New York, County of New York. (April 3, 1999)

Rebuttal Affidavit of William M. Landes in Re: *The Zapruder Film Arbitration.* (February 11, 1999)

EXHIBIT CO 0502

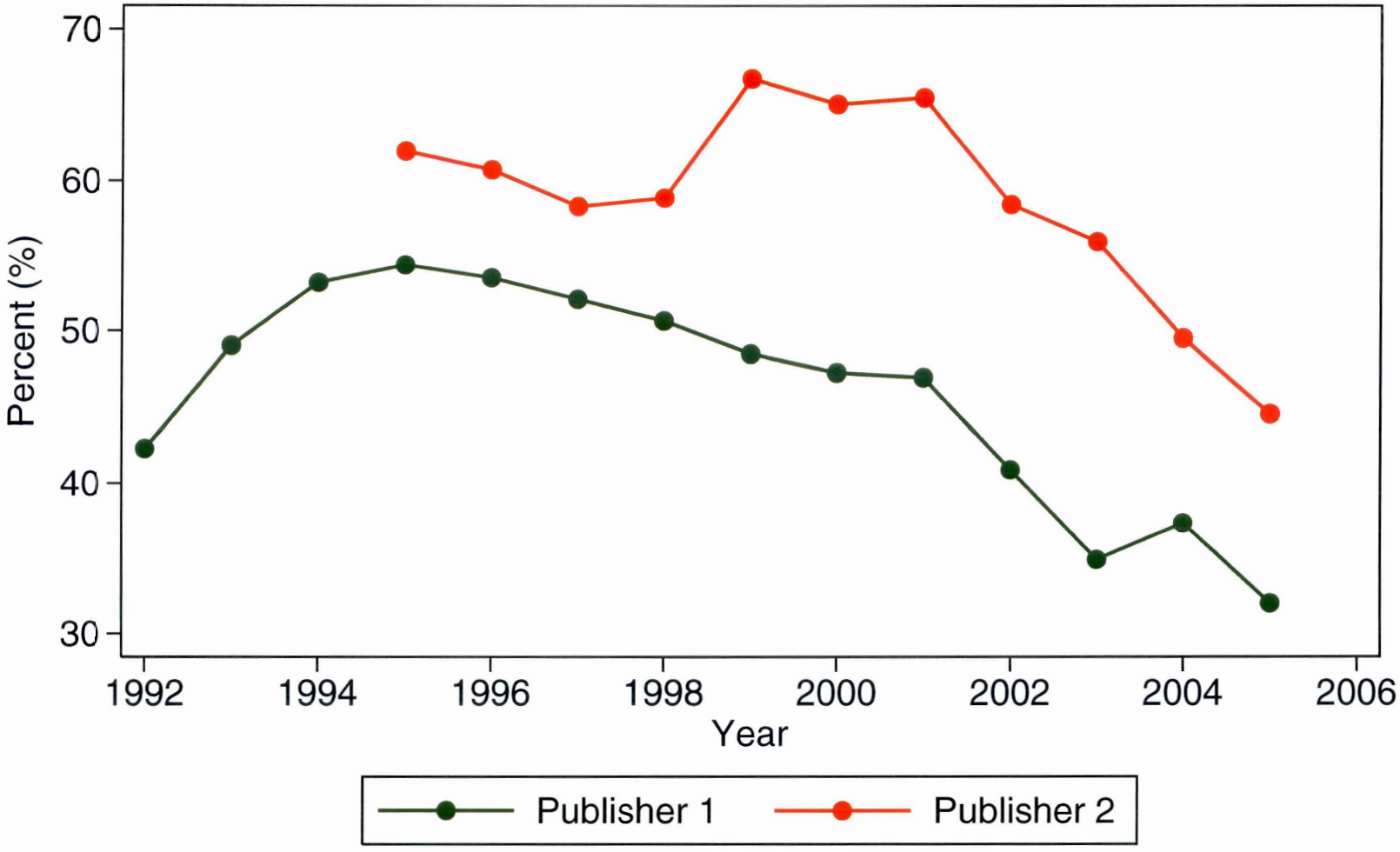
Figure 1
Percentage of Publisher Revenue Generated
Through Mechanical Licensing



Source: Publisher data

EXHIBIT CO 0503

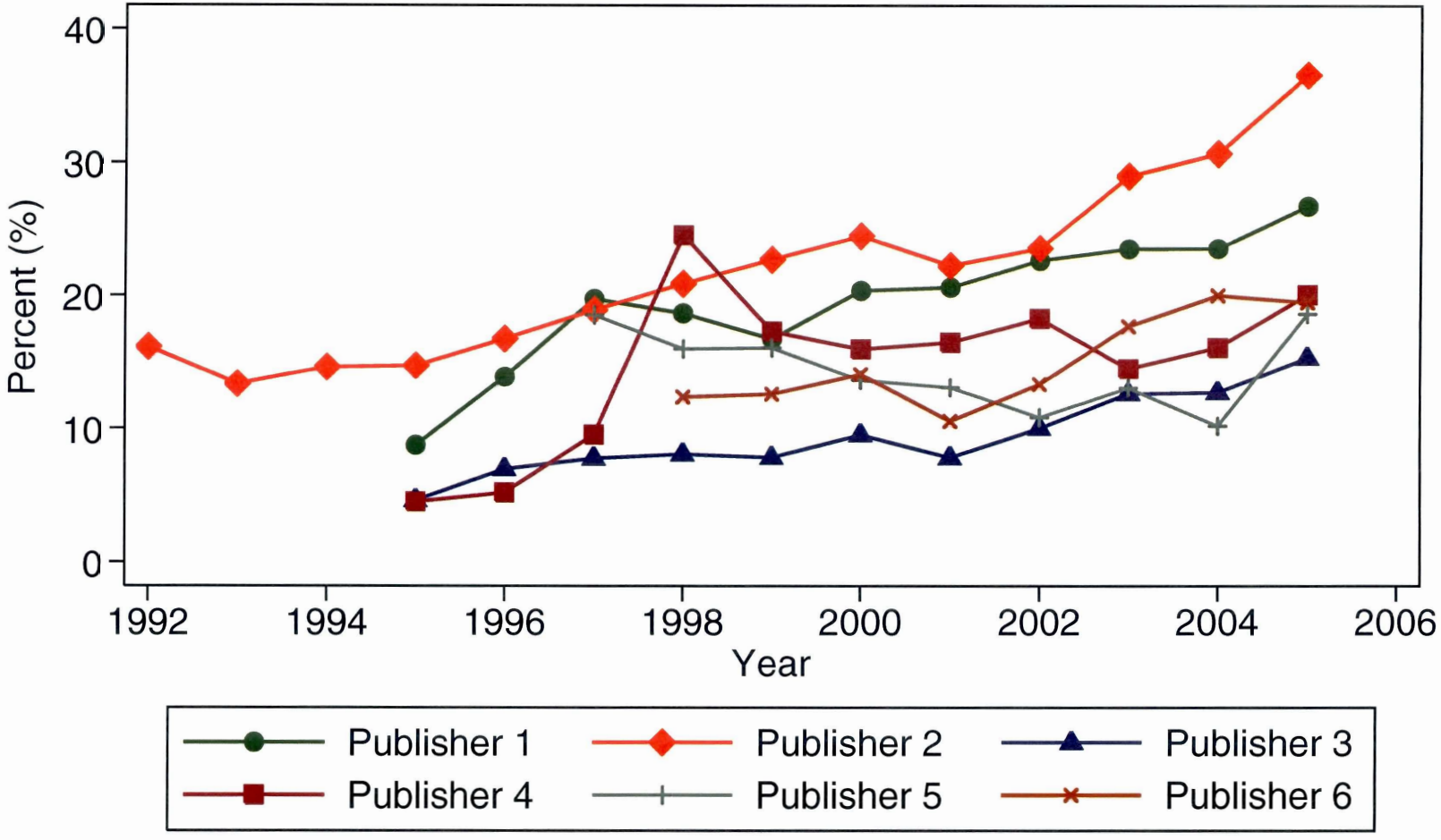
Figure 2
Percent of Writers' Earnings from Mechanical Royalties



Source: Publisher Data

EXHIBIT CO 0504

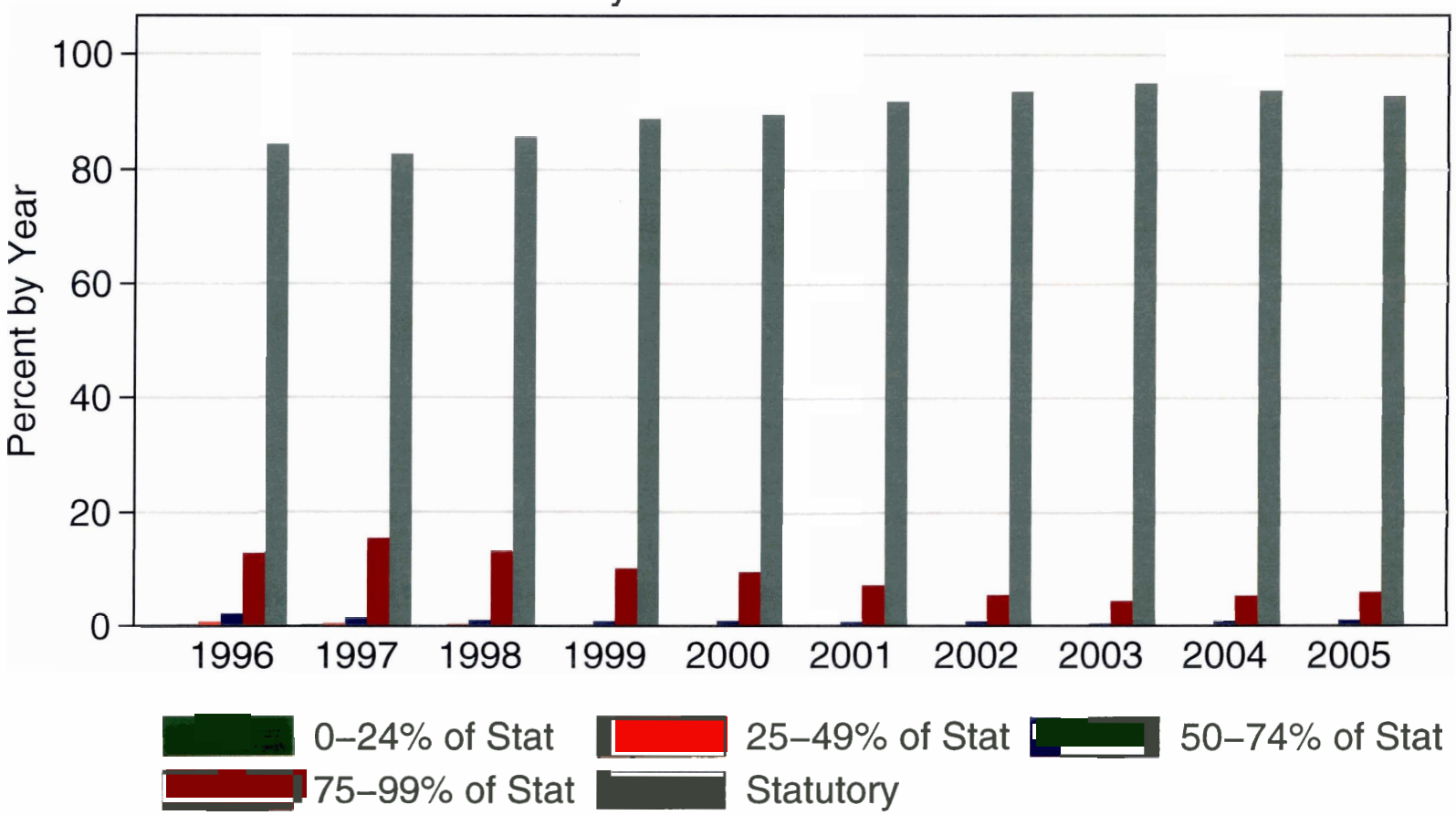
Figure 3
Percentage of Publisher Revenue Generated
Through Synch Licensing



Source: Publisher data

EXHIBIT CO 0505

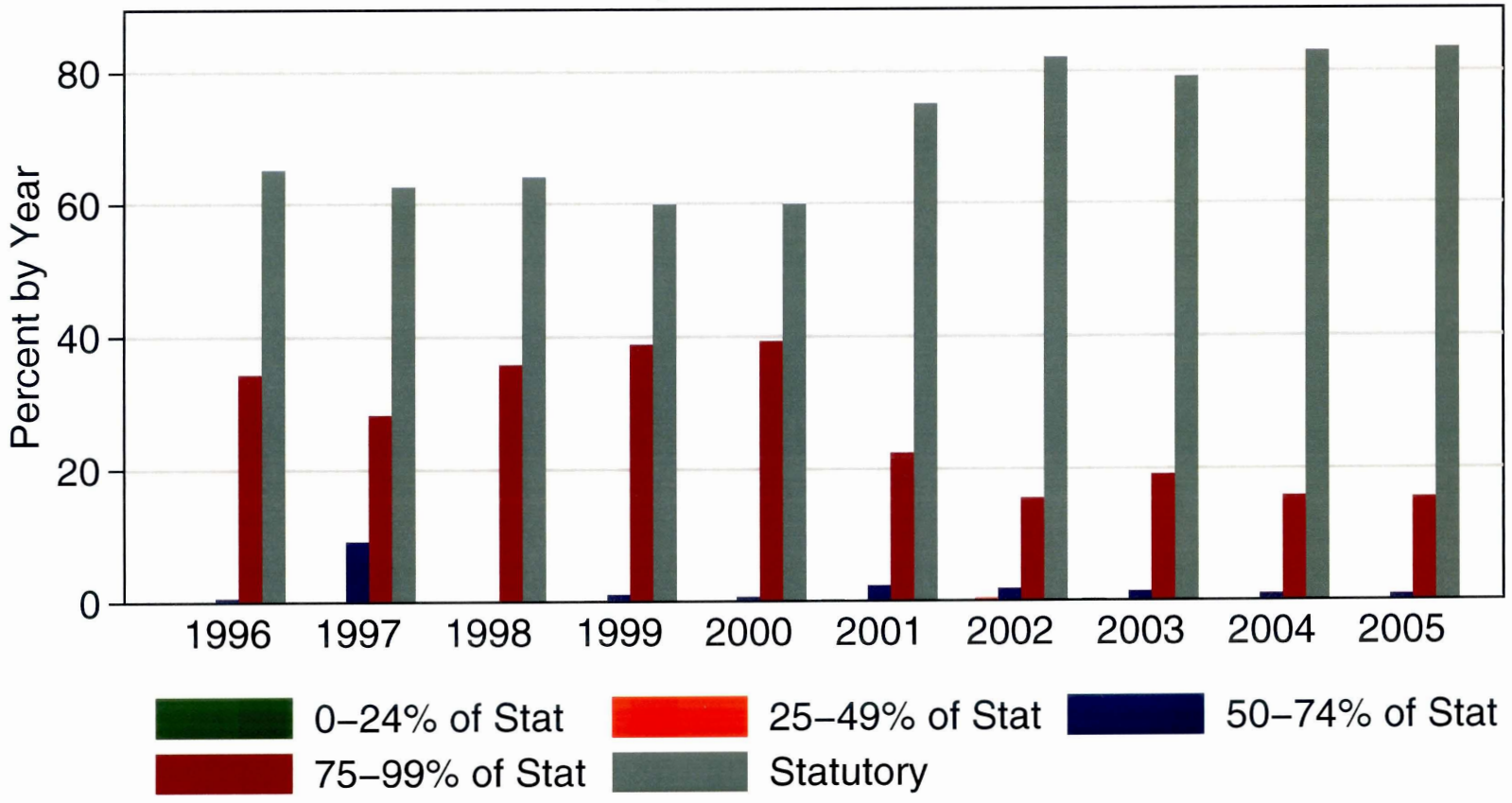
Figure 4
Licenses Issued Each Year by HFA by Rate Category
Physical and NotControlled



Source: HFA Data.
Excludes licenses without rate info or with rate TBD.

EXHIBIT CO 0506

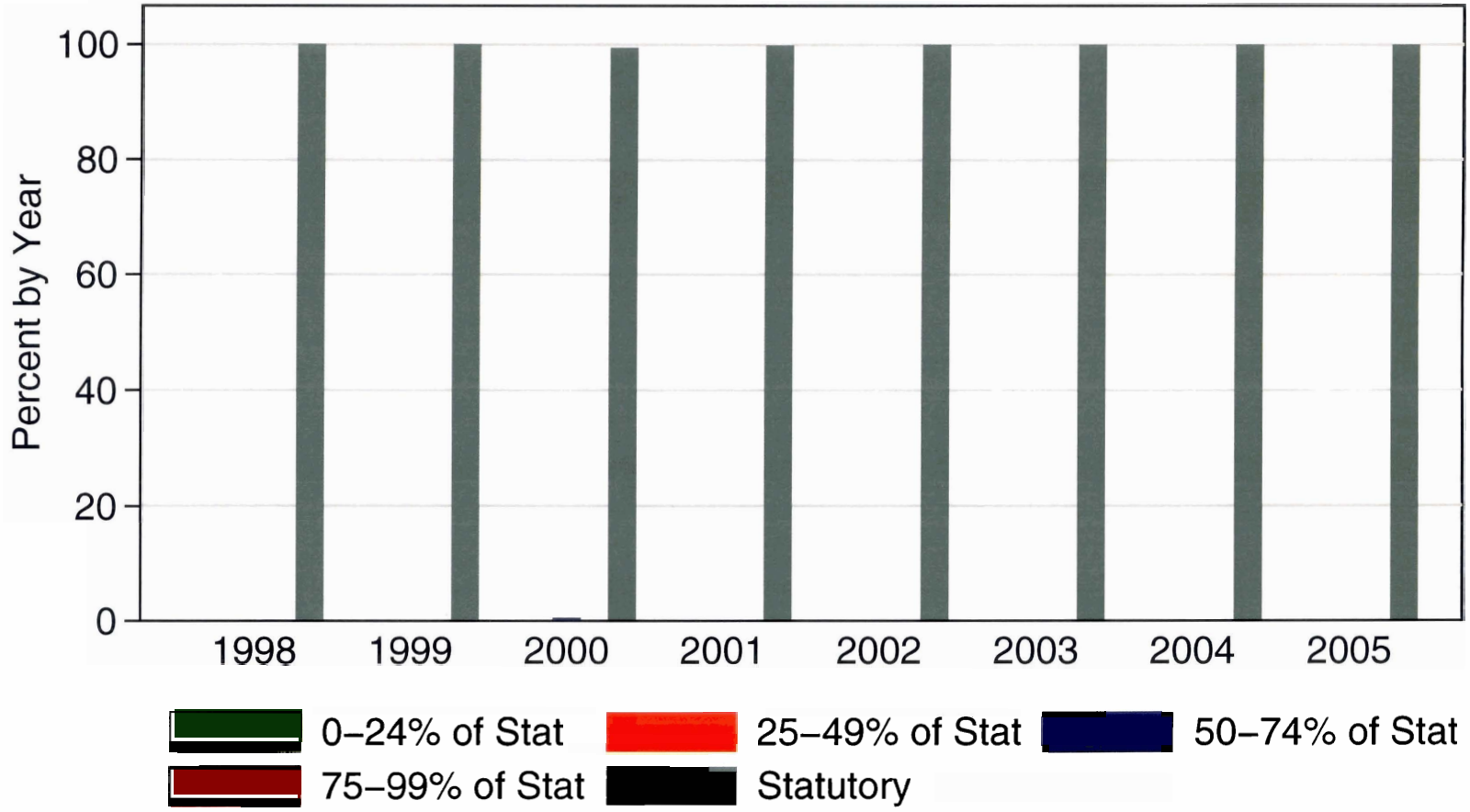
Figure 5
Fraction of Units Sold
by Percent of Statutory Rate by Distribution Year
Physical Not Controlled



Source: HFA Data
Note: Based only on data for licenses issued later than 1995 that can be matched to distributions.

EXHIBIT CO 0507

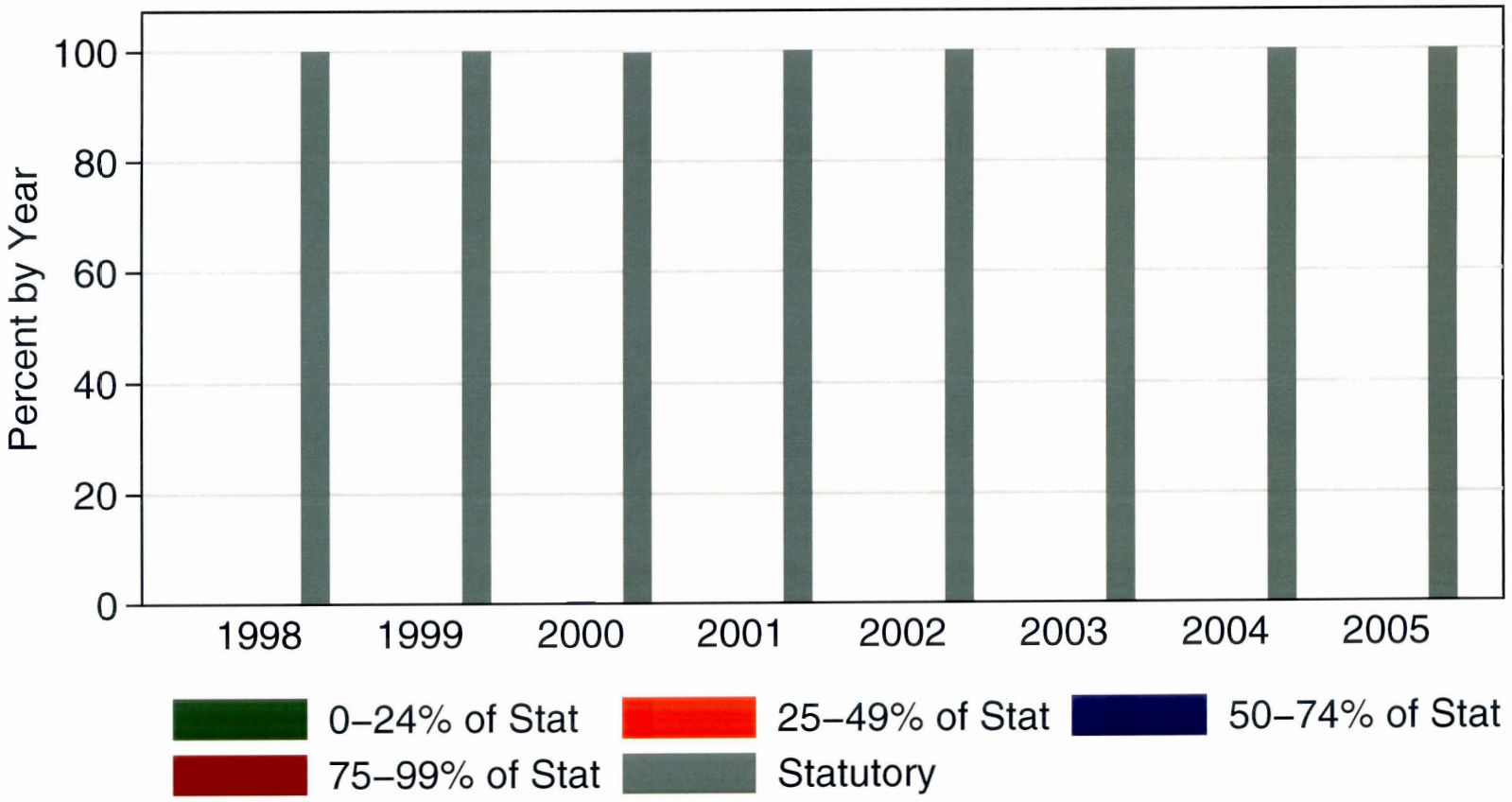
Figure 6
Licenses Issued Each Year by HFA by Rate Category
Permanent Downloads and NotControlled



Source: HFA Data.
Excludes licenses without rate info or with rate TBD.

EXHIBIT CO 0508

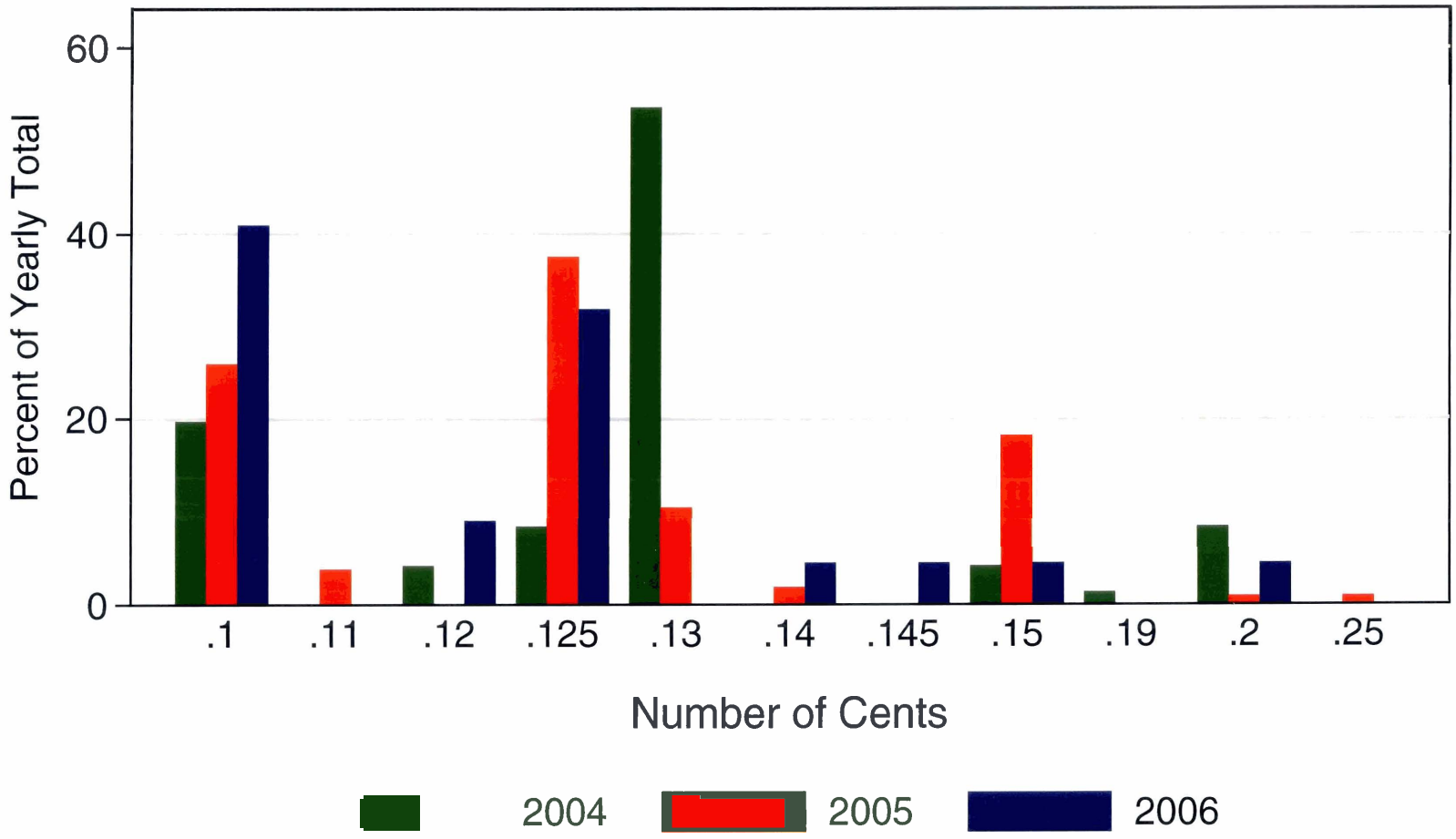
Figure 7
Fraction of Units Sold
by Percent of Statutory Rate by Distribution Year
Permanent Downloads Not Controlled



Source: HFA Data
Note: Based only on data for licenses issued later than 1995 that can be matched to distributions.

EXHIBIT CO 0509

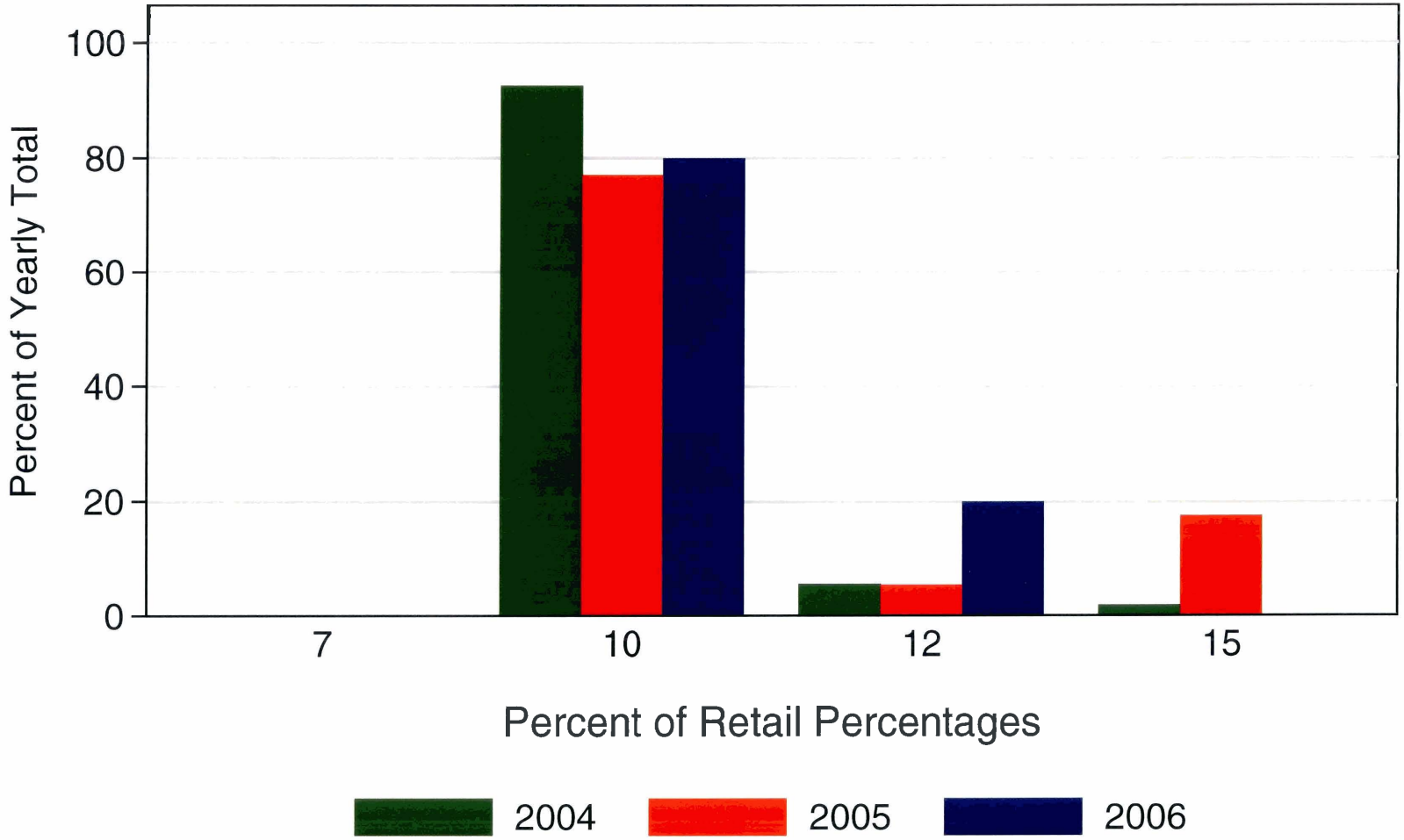
Figure 8
Distribution of MasterTone Minimums
(Number of Cents)



Source: License Agreements provided by Publishers.

EXHIBIT CO 0510

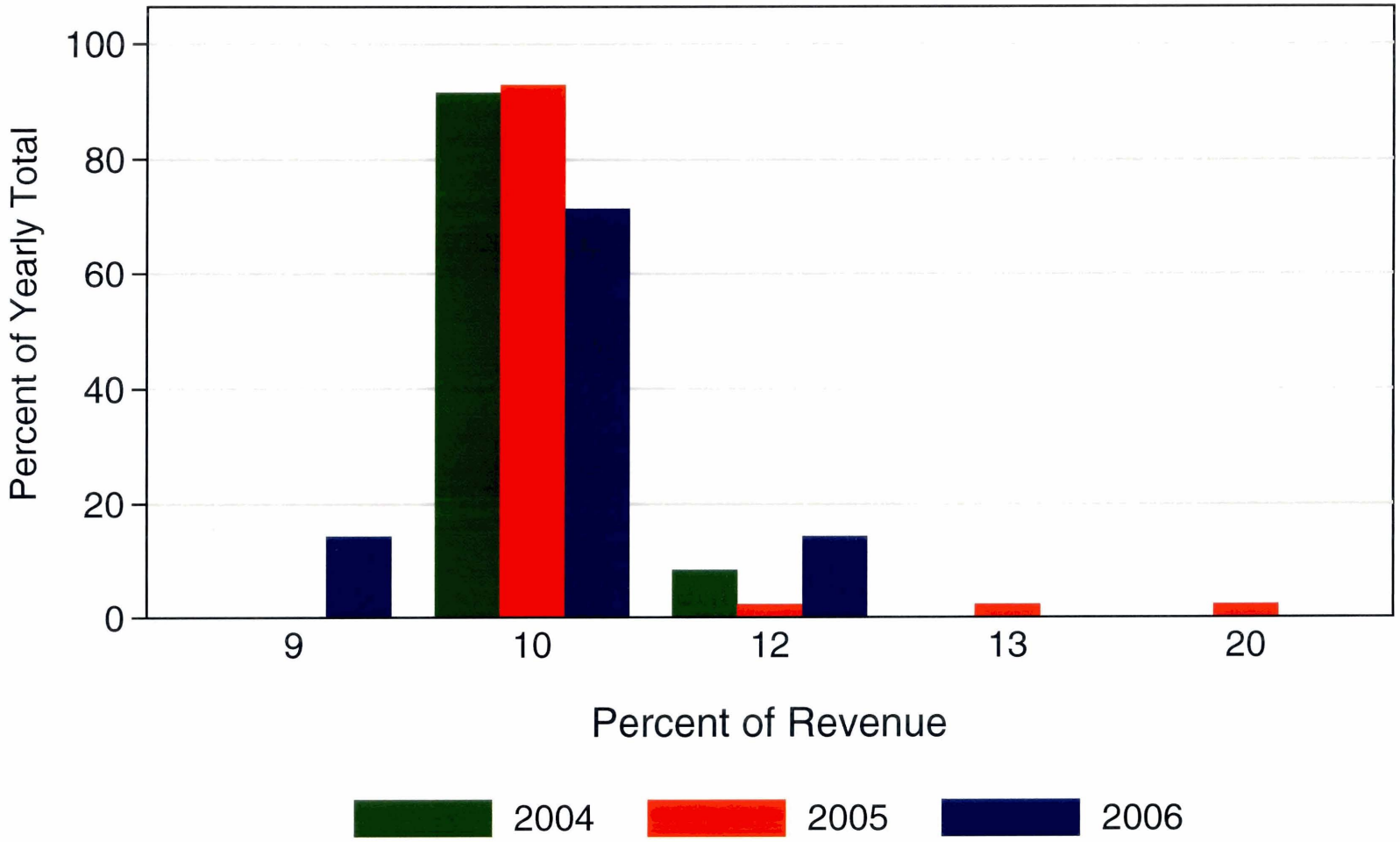
Figure 9
Distribution of MasterTone Percent of Retail Percentages



Source: License Agreements provided by Publishers.

EXHIBIT CO 0511

Figure 10
Distribution of MasterTone Percent of Revenue



Source: License Agreements provided by Publishers.

EXHIBIT CO 0512

2005 Year-End Statistics

1330 Connecticut Avenue, NW, Suite 300, Washington, D.C. 20036
202-775-0101

Manufacturers' Unit Shipments and Retail Dollar Value
(In Millions, net after returns)

Physical

	1995	1996	1997	1998	1999	2000	2001	% CHANGE 2000-2001	2002	% CHANGE 2001-2002	2003	% CHANGE 2002-2003	2004	% CHANGE 2003-2004	2005	% CHANGE 2004-2005
(Units Shipped) CD[1]	722.9	778.9	753.1	847.0	938.9	942.5	881.9	-6.4%	803.3	-8.9%	746.0	-7.1%	767.0	2.8%	705.4	-8.0%
(Dollar Value)	9,377.4	9,934.7	9,915.1	11,416.0	12,816.3	13,214.5	12,909.4	-2.3%	12,044.1	-6.7%	11,232.9	-6.7%	11446.5	1.9%	10,520.2	-8.1%
CD Single	21.5	43.2	66.7	56.0	55.9	34.2	17.3	-49.4%	4.5	-74.1%	8.3	84.5%	3.1	-62.2%	2.8	-12.1%
	110.9	184.1	272.7	213.2	222.4	142.7	79.4	-44.4%	19.6	-75.4%	36.0	83.6%	14.982	-58.4%	10.9	-27.0%
Cassette	272.6	225.3	172.6	158.5	123.6	76.0	45.0	-40.8%	31.1	-30.9%	17.2	-44.7%	5.2	-69.6%	2.5	-52.6%
	2,303.6	1,905.3	1,522.7	1,419.9	1,061.6	626.0	363.4	-41.9%	209.8	-42.3%	108.1	-48.5%	23.7	-78.1%	13.1	-44.9%
Cassette Single[2]	70.7	59.9	42.2	26.4	14.2	1.3	-1.5	-215.4%	-0.5	-68.0%	N/A	N/A	N/A	N/A	N/A	N/A
	236.3	189.3	133.5	94.4	48.0	4.6	-5.3	-215.2%	-1.6	-70.3%	N/A	N/A	N/A	N/A	N/A	N/A
LP/EP	2.2	2.9	2.7	3.4	2.9	2.2	2.3	4.5%	1.7	-23.7%	1.5	-11.5%	1.36	-11.9%	1.02	-25.0%
	25.1	36.8	33.3	34.0	31.8	27.7	27.4	-1.1%	20.5	-25.2%	21.7	6.0%	19.286	-11.3%	14.2	-26.2%
Vinyl Single	10.2	10.1	7.5	5.4	5.3	4.8	5.5	14.6%	4.4	-20.8%	3.8	-14.0%	3.5	-7.3%	2.3	-35.4%
	46.7	47.5	35.6	25.7	27.9	26.3	31.4	19.4%	24.9	-20.6%	21.5	-13.8%	19.9	-7.3%	13.2	-33.4%
Music Video	12.6	16.9	18.6	27.2	19.8	18.2	17.7	-2.7%	14.7	-17.2%	19.9	35.2%	32.8	65.0%	33.8	3.2%
	220.3	236.1	323.9	508.0	376.7	281.9	329.2	16.8%	288.4	-12.4%	399.9	38.7%	607.2	51.8%	602.2	-0.8%
DVD Audio	-						0.3	N/A	0.4	63.8%	0.4	1.2%	0.3	-20.5%	0.5	31.8%
	-						6.0	N/A	8.5	41.3%	8.0	-5.5%	6.5	-19.2%	11.2	72.2%
SACD											1.3	N/A	0.8	-39.7%	0.5	-40.5%
	-										26.3	N/A	16.6	-36.9%	10.0	-39.9%
DVD Video[3]	-			0.5	2.5	3.3	7.9	139.4%	10.7	34.8%	17.5	63.3%	29.0	66.0%	27.8	-4.1%
	-			12.2	66.3	80.3	190.7	137.5%	236.3	23.9%	369.6	56.4%	561.0	51.8%	539.8	-3.8%
Total Units	**1112.7**	**1137.2**	**1063.4**	**1123.9**	**1160.6**	**1079.2**	**968.5**	**-10.3%**	**859.7**	**-11.2%**	**798.4**	**-7.1%**	**814.1**	**2.0%**	**748.7**	**-8.0%**
Total Value	**12320.3**	**12533.8**	**12236.8**	**13711.2**	**14584.7**	**14323.7**	**13740.9**	**-4.1%**	**12614.2**	**-8.2%**	**11854.4**	**-6.0%**	**12154.7**	**2.5%**	**11195.0**	**-7.9%**
Total Retail Units			**817.5**	**850.0**	**869.7**	**788.6**	**733.1**	**-7.0%**	**675.7**	**-7.8%**	**658.2**	**-2.6%**	**687.0**	**4.4%**	**634.8**	**-7.6%**
Total Retail Value			**10,785.8**	**12,165.4**	**13,048.0**	**12,705.0**	**12,388.8**	**-2.5%**	**11,549.0**	**-6.8%**	**11,053.4**	**-4.3%**	**11,423.0**	**3.3%**	**10,477.5**	**-8.3%**

Digital

Download Single	-	-	-	-	-	-	-	-	-	-	-	-	139.4	N/A	366.9	163.3%
	-	-	-	-	-	-	-	-	-	-	-	-	138.0	N/A	363.3	163.3%
Download Album	-	-	-	-	-	-	-	-	-	-	-	-	4.6	N/A	13.6	198.5%
	-	-	-	-	-	-	-	-	-	-	-	-	45.5	N/A	135.7	198.5%
Kiosk[4]	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0.7	N/A
	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1.0	N/A
Music Video	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1.9	N/A
	-	-	-	-	-	-	-	-	-	-	-	-	-	-	3.7	N/A
Total Units	-	-	-	-	-	-	-	-	-	-	-		**143.9**	N/A	**383.1**	**166.2%**
Total Value	-	-	-	-	-	-	-	-	-	-	-		**183.4**	N/A	**503.6**	**174.5%**
Mobile[5]	-	-	-	-	-	-	-	-	-	-	-	-	-	-	170.0	N/A
	-	-	-	-	-	-	-	-	-	-	-	-	-	-	421.6	N/A
Subscription[6]	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1.3	N/A
	-	-	-	-	-	-	-	-	-	-	-	-	-	-	149.2	N/A

Total Digital & Physical

Total Units[7]	**1,112.7**	**1,137.2**	**1,063.4**	**1,123.9**	**1,160.6**	**1,079.2**	**968.5**	**-10.3%**	**859.7**	**-11.2%**	**798.4**	**-7.1%**	**958.0**	**20.0%**	**1,301.8**	**35.9%**
Total Value	**12,320.3**	**12,533.8**	**12,236.8**	**13,711.2**	**14,584.7**	**14,323.7**	**13,740.9**	**-4.1%**	**12,614.2**	**-8.2%**	**11,854.4**	**-6.0%**	**12,338.1**	**4.1%**	**12,269.5**	**-0.6%**

Retail value is value of shipments at recommended or estimated list price

[1] Includes DualDisc
[2] RIAA's reports will no longer reflect shipments of cassette singles
[3] While broken out for this chart, DVD Video Product is included in the Music Video totals
[4] Includes Singles and Albums
[5] Includes Master Ringtunes, Ringbacks, Music Videos, Full Length Downloads, and Other Mobile
[6] Weighted Annual Average
[7] Units does not include subscriptions

EXHIBIT CO 0513

The Recor ding Industr y Association of America' s

1999 Y earend Statistics

1330 Connecticut A ve, NW, Suite 300, W ashington, D.C. 20036
(202) 775-0101

Manufacturers' Unit Shipments and Dollar Value
(In Millions, net after returns)

	1990	1991	1992	1993	1994	1995	1996	1997	1998	% CHANGE 1997-1998	1999	% CHANGE 1998-1999
(Units Shipped) CD	286.5	333.3	407.5	495.4	662.1	722.9	778.9	753.1	847.0	12.5%	938.9	10.8%
(Dollar Value)	3,451.6	4,337.7	5,328.5	6,511.4	8,464.5	9,377.4	9,934.7	9,915.1	11,416.0	15.1%	12,816.3	12.3%
CD Single	1.1	5.7	7.3	7.6	9.3	21.5	43.2	66.7	56.0	-16.0%	55.9	-0.1%
	6.0	35.1	45.1	45.6	56.1	110.9	184.1	272.7	213.2	-21.8%	222.4	4.3%
Cassette	442.2	360.1	366.4	339.5	345.4	272.6	225.3	172.6	158.5	-8.2%	123.6	-22.0%
	3,472.4	3,019.6	3,116.3	2,915.8	2,976.4	2,303.6	1,905.3	1,522.7	1,419.9	-6.8%	1,061.6	-25.2%
Cassette Single	87.4	69.0	84.6	85.6	81.1	70.7	59.9	42.2	26.4	-37.4%	14.2	-46.0%
	257.9	230.4	298.8	298.5	274.9	236.3	189.3	133.5	84.4	-29.3%	46.0	-49.2%
LP/EP	11.7	4.8	2.3	1.2	1.9	2.2	2.9	2.7	3.4	25.9%	2.9	-14.0%
	86.5	29.4	13.5	10.6	17.8	25.1	36.8	33.3	34.0	2.1%	31.8	-6.7%
Vinyl Single	27.6	22.0	19.8	15.1	11.7	10.2	10.1	7.5	5.4	-28.0%	5.3	-2.5%
	94.4	63.9	66.4	51.2	47.2	46.7	47.5	35.6	25.7	-27.8%	27.9	8.4%
Music Video	9.2	6.1	7.6	11.0	11.2	12.6	16.9	18.6	27.2	46.2%	19.8	-28.3%
	172.3	118.1	157.4	213.3	231.1	220.3	236.1	323.9	508.0	56.8%	376.7	-27.6%
*DVD	*	*	*	*	*	*	*	*	0.5	*	2.5	405%
	*	*	*	*	*	*	*	*	12.2	*	66.3	442%
Total Units	865.7	801.0	895.5	955.6	1,122.7	1,112.7	1,137.2	1,053.4	1,124.3	5.7%	1,160.6	3.2%
Total Value	7,541.1	7,834.2	9,024.0	10,046.6	12,068.0	12,320.3	12,533.8	12,236.8	13,723.5	12.1%	14,564.5	6.3%

*While broken out for this chart, DVD Audio Product is included in the Music Video totals

Total Retail Units	833.9	817.5	850.0	4.0%	869.7	2.3%
Total Retail Value	10,768.0	10,785.8	12,165.4	12.8%	13,048.0	7.3%

EXHIBIT CO 0514

Statement of Marybeth Peters
The Register of Copyrights
before the
Subcommittee on Courts,
The Internet and Intellectual Property
of the House Committe on the Judiciary

United States Senate
108th Congress, 2d Session

March 11, 2004

Section 115 Compulsory License

Mr. Chairman, Mr. Berman, and distinguished members of the Subcommittee, I appreciate the opportunity to appear before you to testify on the Section 115 compulsory license, which allows for the making and distribution of physical phonorecords and digital phonorecord deliveries. The compulsory license to allow for the use of nondramatic musical works has been with us for 95 years and has resulted in the creation of a multitude of new works for the pleasure and consumption of the public, and in the creation of a strong and vibrant music industry which continues to flourish to this day. Nevertheless, the means to create and provide music to the public has changed radically in the last decade, necessitating changes in the law to protect the rights of copyright owners while at the same time balancing the needs of the users in a digital world.

Background

1. *Mechanical Licensing under the 1909 Copyright Act*

In 1909, Congress created the first compulsory license to allow anyone to make a mechanical reproduction (known today as a phonorecord) of a musical composition [(1)] without the consent of the copyright owner provided that the person adhered to the provisions of the license. The impetus for this decision was the emergence of the player piano and the ambiguity surrounding the extent of the copyright owner's right to control the making of a copy of its work on a piano roll. The latter question was settled in part in 1908 when the Supreme Court held in White-Smith Publishing Co. v. Apollo Co. [(2)] that perforated piano rolls were not "copies" under the copyright statute in force at that time, but rather parts of devices which performed the work. During this period (1905-1909), copyright owners were seeking legislative changes which would grant them the exclusive right to authorize the mechanical reproduction of their works - a wish which Congress granted shortly thereafter. Although the focus at the time was on piano rolls, the mechanical reproduction right also applied to the nascent medium of phonograph records as well.

Congress, however, was concerned that the right to make mechanical reproductions of musical works might become a monopoly controlled by a single company. Therefore, it decided that rather than provide for an exclusive right to make mechanical reproductions, it would create a compulsory license in Section 1(e) of the 1909 Act which would allow any person to make "similar use" of the musical work upon payment of a royalty of two cents for

"each such part manufactured." However, no one could take advantage of the license until the copyright owner had authorized the first mechanical reproduction of the work. Moreover, the initial license placed notice requirements on both the copyright owners and the licensees. Section 101(e). The copyright owner had to file a notice of use with the Copyright Office - indicating that the musical work had been mechanically reproduced - in order to preserve his rights under the law, whereas the person who wished to use the license had to serve the copyright owner with a notice of intention to use the license and file a copy of that notice with the Copyright Office. The license had the effect of capping the amount of money a composer could receive for the mechanical reproduction of this work. The two cent rate set in 1909 remained in effect until January 1, 1978, and acted as a ceiling for the rate in privately negotiated licenses.

Such stringent requirements for use of the compulsory license did not foster wide use of the license. It is my understanding that the "mechanical" license as structured under the 1909 Copyright Act was infrequently used until the era of tape piracy in the late 1960s. When tape piracy was flourishing, the "pirates" inundated the Copyright Office with notices of intention, many of which contained hundreds of song titles. The music publishers refused to accept such notices and any proffered royalty payments since they did not believe that reproduction and duplication of an existing sound recording fell within the scope of the compulsory license. After this flood of filings passed, the use of the license appears to have again became almost non-existent; up to this day, very few notices of intention are filed with the Copyright Office.

2. *The Mechanical License under the 1976 Copyright Act*

The music industry adapted to the new license and, by and large, sought its retention, opposing the position of the Register of Copyrights in 1961 to sunset the license one year after enactment of the omnibus revision of the copyright law. Music publishers and composers had grown accustomed to the license and were concerned that the elimination of the license would cause unnecessary disruptions in the music industry. Consequently, the argument shifted over time away from the question of whether to retain the license and, instead, the debate focused on reducing the burdens on copyright owners, clarifying ambiguous provisions, and setting an appropriate rate. The House Judiciary Committee's approach reflected this trend and in its 1976 report on the bill revising the Copyright Act, it reiterated its earlier position "that a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music," but "that the present system is unfair and unnecessarily burdensome on copyright owners, and that the present statutory rate is too low." H. Rep. No. 94-1476, at 107 (1976), citing H. Rep. No. 83, at 66-67 (1967).

To that end, Congress adopted a number of new conditions and clarifications in Section 115 of the Copyright Act of 1976, including:

- The license becomes available only after a phonorecord has been distributed to the public in the United States with the authority of the copyright owner (§115(a)(1));
- The license is only available to someone whose primary intent is to distribute phonorecords to the public for private use (§115(a)(1));
- A licensee cannot duplicate a sound recording embodying the musical work without the authorization of the copyright owner of the sound recording (§115(a)(1));

A musical work may be rearranged only "to the extent necessary to conform it to the style or manner of the interpretation of the performance involved," without "chang[ing] the basic melody or fundamental character of the work," (§115(a)(2));

- A licensee must still serve a Notice of Intention to obtain a compulsory license on the copyright owner or, in the case where the public records of the Copyright Office do not identify the copyright owner and include an address, the licensee must file the Notice of Intention with the Copyright Office (§115(b)(1));

- A licensee must serve the notice on the copyright owner "before or within thirty days after making, and before distributing any phonorecords of the work." Otherwise, the licensee loses the opportunity to make and distribute phonorecords pursuant to the compulsory license (§115(b)(1));

- A copyright owner is entitled to receive copyright royalty fees only on those phonorecords made [3] and distributed [4] after the copyright owner is identified in the registration or other public records of the Copyright Office (§115(c)(1)); [5]

- The rate payable for each phonorecord made and distributed is adjusted by an independent body which, prior to 1993, was the Copyright Royalty Tribunal. [6]

- A compulsory license may be terminated for failure to pay monthly royalties if a user fails to make payment within 30 days of the receipt of a written notice from the copyright owner advising the user of the default (§115(c)(6)).

The Section 115 compulsory license worked well for the next two decades, but the use of new digital technology to deliver music to the public required a second look at the license to determine whether it continued to meet the needs of the music industry. During the 1990s, it became apparent that music services could offer options for the enjoyment of music in digital formats either by providing the public an opportunity to hear any sound recording it wanted on-demand or by delivering a digital version of the work directly to a consumer's computer. In either case, there was the possibility that the new offerings would obviate the need for mechanical reproductions in the forms heretofore used to distribute musical works and sound recordings in a physical format, e.g., vinyl records, cassette tapes and most recently audio compact discs. Moreover, it was clear that digital transmissions were substantially superior to analog transmissions. In an early study conducted by the Copyright Office, the Office noted two significant improvements associated with digital transmissions: a superior sound quality and a decreased susceptibility to interference from physical structures like tall buildings or tunnels. *See* Register of Copyrights, U.S. Copyright Office, Copyright Implications of Digital Audio Transmission Services (1991).

3. *The Digital Performance Right in Sound Recordings Act of 1995*

By 1995, Congress recognized that "digital transmission of sound recordings [was] likely to become a very important outlet for the performance of recorded music." S. Rep. No. 104-128, at 14 (1995). Moreover, it realized that "[t]hese new technologies also may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners." Id. For these reasons, Congress made changes to Section 115 to meet the challenges of providing music in a digital format when it enacted the Digital Performance Right

in Sound Recordings Act of 1995 ("DPRA"), Pub. L. 104-39, 109 Stat. 336, which also granted copyright owners of sound recordings an exclusive right to perform their works publicly by means of a digital audio transmission, 17 U.S.C. §106(6), subject to certain limitations. *See* 17 U.S.C. §114. The amendments to Section 115 clarified the reproduction and distribution rights of music copyright owners and producers and distributors of sound recordings, especially with respect to what the amended Section 115 termed "digital phonorecord deliveries." Specifically, Congress wanted to reaffirm the mechanical rights of songwriters and music publishers in the new world of digital technology. It is these latter amendments to Section 115 that are of particular interest today.

First, Congress expanded the scope of the compulsory license to include the making and distribution of a digital phonorecord and, in doing so, adopted a new term of art, the "digital phonorecord delivery" ("DPD"), to describe the process whereby a consumer receives a phonorecord by means of a digital transmission, the delivery of which requires the payment of a statutory royalty under Section 115. The precise definition of this new term reads as follows:

> A "digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, nonintegrated subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

17 U.S.C. §115(d). What is noteworthy about the definition is that it includes elements related to the right of public performance and the rights of reproduction and distribution with respect to both the musical work and the sound recording. The statutory license, however, covers only the making of the phonorecord, and only with respect to the musical work. The definition merely acknowledges that the public performance right and the reproduction and distribution rights may be implicated in the same act of transmission and that the public performance does not in and of itself implicate the reproduction and distribution rights associated with either the musical composition or the sound recording. In fact, Congress included a provision to clarify that "nothing in this Section annuls or limits the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission." 17 U.S.C. §115(c)(3)(K).

Another important distinction between traditional mechanical phonorecords and DPDs brought about by the DPRA is the expansion of the statutory license to include reproduction and transmission by means of a digital phonorecord delivery of a musical composition embodied in a sound recording owned by a third party, provided that the licensee obtains authorization from the copyright owner of the sound recording to deliver the DPD. [7] Thus, the license provides for more than the reproduction and distribution of one's own version of a performance of a musical composition by means of a DPD. Under the expanded license, a service providing DPDs can in effect become a virtual record store if it is able to clear the rights to the sound recordings. More importantly, the DPRA allows a copyright owner of a sound recording to license the right to make DPDs of both the sound recording and the underlying musical work to third parties if it has obtained the right to make DPDs from the copyright owner of the musical work. See 17 U.S.C. §115(c)(3)(I), S. Rep. No. 104-128, at 43

(1995).

Apart from the extension of the compulsory license to cover the making of DPDs, Congress also addressed the common industry practice of incorporating controlled composition clauses into a songwriter/performer's recording contract, whereby a recording artist agrees to reduce the mechanical royalty rate payable when the record company makes and distributes phonorecords including songs written by the performer. In general, the DPRA provides that privately negotiated contracts entered into after June 22, 1995, between a recording company and a recording artist who is the author of the musical work cannot include a rate for the making and distribution of the musical work below that established for the compulsory license. There is one notable exception to this general rule. A recording artist-author who effectively is acting as her own music publisher may accept a royalty rate below the statutory rate if the contract is entered into after the sound recording has been fixed in a tangible medium of expression in a form intended for commercial release. 17 U.S.C. §115(c)(3)(E).

The amended license also extended the current process for establishing rates for the mechanical license to DPDs. Under the statutory structure, rates for the making and reproduction of the DPDs can be decided either through voluntary negotiations among the affected parties or, in the case where these parties are unable to agree upon a statutory rate, by a Copyright Arbitration Royalty Panel ("CARP"). Pursuant to Section 115(c)(3)(D), the CARP must establish rates and terms that "distinguish between digital phonorecord deliveries where the reproduction or distribution of the phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and digital phonorecord deliveries in general."

The difficult issue, however, is identifying those reproductions that are subject to compensation under the statutory license, a subject I will discuss in greater detail.

Regulatory Responses

1. *Notices of Intention to Use and Statements of Account*

Section 115(b) requires that a person who wishes to use the compulsory license serve a notice of his or her intention to use a musical composition with the copyright owner before or within thirty days after making, and before distributing any phonorecords. Regulations in place since the enactment of the 1976 Copyright Act followed the statutory scheme and required that a separate Notice of Intention be served for each nondramatic musical work embodied or intended to be embodied in phonorecords to be made under the compulsory license. Following the statutory scheme, the regulations provided that if the registration or other public records of the Copyright Office do not identify the copyright owner of a particular work and include that owner's address, the person wishing to use the compulsory license could file the Notice of Intention with the Copyright Office. 37 C.F.R. §201.18. The regulations also implemented the statutory requirement that each licensee pay royalties, on a monthly basis, to each copyright owner whose musical works the licensee is using, and that each licensee serve monthly statements of account and an annual statement of account on each copyright owner. 37 C.F.R. §201.19.

The regulations governing this requirement were amended after the passage of the DPRA in order to accommodate the making of DPDs. Initial amendments to the rules were promulgated on July 30, 1999, and addressed when a DPD is made, manufactured, or distributed for purposes of the Section 115 license such that the obligation to pay the royalty fee attaches. The amended regulation provided that a DPD be treated as a phonorecord made

and distributed on the date the phonorecord is digitally transmitted. The amended regulation also provided a mechanism for the delivery of a usable DPD where, in the first instance, the initial transmission failed or did not result in a complete and functional DPD. 64 FR 41286. (July 30, 1999). Because these rules were dealing with new concepts applicable to developing services in a nascent industry, the Office adopted the rules on an interim basis and left the door open to revisit the notice and recordkeeping requirements.

Two years later, the Office initiated a second rulemaking proceeding to address concerns of musical work copyright owners and users of the compulsory license, especially those developing new digital music services with the intention of developing extensive music libraries with hundreds of thousands of titles in order to offer these recordings to their subscribers for a fee. *See* 66 FR 45241 (August 28, 2001). Both sides wanted easier ways to meet the requirements for obtaining the license, including more convenient methods to effect service of the Notice of Intention to use the license on the copyright owners, a provision to allow use of a single notice to identify use of multiple works, a simplification of the elements of the notice, and a provision to make clear that a notice may be legally sufficient even if the notice contains minor errors.

We thought many of these suggestions were appropriate and perhaps long overdue. Thus, we are pleased to announce that the Office is publishing today in the Federal Register proposed amendments to the regulations governing the notice and recordkeeping requirements that are designed to increase the ease with which a person who intends to utilize the license may effect service on the copyright owner and provide the information required to identify the musical work. We are aware that many interested parties will not find the proposed changes sufficient to create a seamless licensing regime. However, the extent of any change we can make in the regulations is limited by the scope of the law and, as we explain in the current notice, a number of the changes proposed by the interested parties would require a change in the law. Nevertheless, we believe the proposed amendments represent progress in meeting the needs of digital services seeking use of the license as a means to clear the rights to make and distribute a vast array of musical works in a DPD format, and they also offer improvements to the copyright owners who receive compensation under the Section 115 license. Specifically, the new rules propose the following notable changes:

- A copyright owner may designate an authorized agent to accept the Notices of Intention and/or the royalty payments, although the rules do not require that a single agent perform both functions;

- In the case where the copyright owner uses an authorized agent to accept the notices, the rules would require the copyright owner to identify to whom statements of account and royalty payments shall be made;

- A person intending to use the compulsory licence may serve a Notice of Intention on the copyright owner or its agent at an address other than the last address listed in the public records of the Copyright Office if that person has more recent or accurate information than is contained in the Copyright Office records;

- A Notice of Intention may be submitted electronically to a copyright owner or its authorized agent in cases where the copyright owner or authorized agent has announced it will accept electronic submissions.

Multiple works may be listed on a single Notice of Intention when the works are owned by the same copyright owner or, in the case where the notice will be served upon an authorized agent, the agent represents at least one of the copyright owners of each of the listed works;

- If a Notice of Intention includes more than 50 song titles, the proposed rules give the copyright owner or its agent a right to request and receive a digital file of the names of the copyrighted works in addition to the original paper copy of the Notice.

- A Notice of Intention may be submitted by an authorized agent of the person who seeks to obtain the license;

- Harmless errors that do not materially affect the adequacy of the information required to serve the purposes of the notice requirement shall not render a Notice of Intention invalid.

- In order to recover the Copyright Office's costs in processing Notices of Intention that are filed with the Office, the filing fee that has been required for the filing of a Notice of Intention with the Copyright Office when the identity and address of the copyright owner cannot be found in the registration or other public records of the Copyright Office will also be required when a Notice of Intention is filed with the Office after the Notice has been returned to the sender because the copyright owner is no longer located at the address identified in the Copyright Office records or has refused to accept delivery; and

- The fee charged for the filing of a Notice of Intention with the Copyright Office will be based upon the number of musical works identified in the Notice of Intention. We are studying the costs incurred by the Office in connection with such filings and I will submit to Congress new proposed fees that cover such costs. The resulting fee should be considerably lower per work than the current fee. (8)

I am hopeful that these proposed changes will facilitate the use of the license for both copyright owners and licensees, and I expect to adopt the proposed rules in final form after considering comments on the proposed rules and making any necessary modifications. I believe that these changes represent the best that the Office can do under the current statute, but I recognize that it may be advisable to amend Section 115 to permit further changes in the procedure by which persons intending to use the compulsory license may provide notice of their intention. I will discuss some possible amendments later in my testimony.

Moreover, these regulations only address the technical requirements for securing the compulsory license. During the last rate adjustment proceeding, questions of a more substantive nature arose with respect to DPDs, requiring the Office to publish a Notice of Inquiry to consider the very scope of the Section 115 license. I will now turn to a discussion of those issues.

2. *Consideration of what constitutes an "incidental digital phonorecord delivery"*

In 1995 when Congress passed the DPRA, its intent was to extend the scope of the

compulsory license to cover the making and distribution of a phonorecord in a digital format - what Congress referred to as the making of a digital phonorecord delivery. Since that time, what constitutes a "digital phonorecord delivery" has been a hotly debated topic. Currently, the Copyright Office is in the midst of a rulemaking proceeding to examine this question, especially in light of the new types of services being offered in the marketplace, e.g. "on-demand streams" and "limited downloads." *See* 66 FR 14099 (March 9, 2001).

The Office initiated this rulemaking proceeding in response to a petition from the Recording Industry Association of America ("RIAA"), asking that we conduct such a proceeding to resolve the question of which types of digital transmissions of recorded music constitute a general DPD and which types should be considered an incidental DPD. RIAA made the request after it became apparent that industry representatives found it difficult, if not impossible, to negotiate a rate for the incidental DPD category, as required by law, when no one knew which types of prerecorded music were to be included in this category.

Central to this inquiry are questions about two types of digital music services: "on-demand streams" and "limited downloads." For purposes of the inquiry, the music industry has defined an "on-demand stream" as an "on-demand, real-time transmission using streaming technology such as Real Audio, which permits users to listen to the music they want when they want and as it is transmitted to them," and a "limited download" as an "on-demand transmission of a time-limited or other use-limited (i.e., non-permanent) download to a local storage device (e.g., the hard drive of the user's computer), using technology that causes the downloaded file to be available for listening only either during a limited time (e.g., a time certain or a time tied to ongoing subscription payments) or for a limited number of times." The Office has received comments and replies to its initial notice of inquiry. I anticipate that we will conclude the proceeding this year after either holding a hearing or soliciting another round of comments from interested parties in order to get a fresh perspective on these complex and difficult questions in light of the current technology and business practices.

The perspective of music publishers appears to be clear. They have taken the position that both on-demand streams and limited downloads implicate their mechanical rights. Moreover, they maintain that copies made during the course of a digital stream or in the transmission of a DPD are for all practical purposes reproductions of phonorecords that are covered by the compulsory license. The recording industry supports this view, recognizing that while certain reproductions of a musical work are exempt under Section 112(a), other reproductions do not come within the scope of the exemption. For that reason, the recording industry has urged the Office to interpret the Section 115 license in such a way as to cover all reproductions of a musical work necessary to operate such services; and, we are considering their arguments. In the meantime, certain record companies and music publishers have worked out a marketplace solution.

a. Marketplace solution

In 2001, the RIAA, the National Music Publishers' Association, Inc. ("NMPA"), and the Harry Fox Agency, Inc. ("HFA") entered into an agreement concerning the mechanical licensing of musical works for new subscription services on the Internet. Licenses issued under the RIAA/NMPA/HFA agreement are nonexclusive and cover all reproduction and distribution rights for delivery of on-demand streams and limited downloads and include the right to make server copies, buffer copies and other related copies used in the operation of a covered service. The license also provides at no additional cost for "On-Demand Streams of Promotional Excerpts," which are defined as a stream consisting of no more that thirty (30) seconds of playing time of

the sound recording of a musical work or no more than the lesser of ten percent (10%) or sixty (60) seconds of playing time of a sound recording of a musical work longer than five minutes.

The industry approach to resolving the problems associated with mechanical licensing for digital music services is both innovative and comprehensive, resolving certain legal questions associated with temporary, buffer, cache and server copies of a musical work associated with digital phonorecord deliveries purportedly made under the Section 115 license, as well as the use of promotional clips. The Office welcomes the industry's initiative and creativity, and fully supports marketplace solutions to what really are commercial transactions between owners and users.

However, parties should not need to rely upon privately negotiated contracts exclusively to clear the rights needed to make full use of a statutory license, or need to craft an understanding of the legal limits of the compulsory license within the provisions of the private contract. The scope of the license and any limitations on its use should be clearly expressed in the law.

The 1995 amendments to Section 115, however, do not provide clear guidelines for use of the Section 115 license for the making of certain reproductions of a musical work needed to effectuate a digital transmission other than to acknowledge that a reproduction may be made during the course of a digital performance, and that such reproduction may be considered to be an incidental DPD.

But are they? Section 115 does not provide a definition for incidental DPDs, so what constitutes an "incidental DPD" is not always clear. While some temporary copies made in the course of a digital transmission, such as buffer copies made in the course of a download, may qualify, others - such as buffer copies made in the course of a transmission of a performance (e.g., streaming) - are more difficult to fit within the statutory definition. In either case, it is clear that such copies need to comply with the statutory definition in order to be covered by the compulsory license. In other words, the copies must result in an "individual delivery of a phonorecord which results in a *specifically identifiable reproduction* by or for any transmission recipient of a phonorecord of that sound recording." 17 U.S.C. §115(d) (emphasis added), Similar questions can be raised with respect to cache copies and intermediate server copies made in the course of (1) downloads and (2) streaming of performances.

Apparently because of such uncertainties, the RIAA/NMPA/HFA agreement includes a section entitled "Legal Framework for Agreement." It contains two provisions that delineate how temporary copies made in order to provide either a limited download or an on-demand stream fit within the statutory framework of the Section 115 license. Specifically, it provides that

> under current law the process of making On-Demand Streams through Covered Services (from the making of server reproductions to the transmission and local storage of the stream), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproduction and any temporary or cached reproductions through to the transmission recipient of the On-Demand Stream) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act;[and]

> that under current law the process of making Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the Limited Download), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the Limited Download) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act.

Paragraph 8.1(a) and (b), respectively, of the RIAA/NMPA/HFA Licensing Agreement (as submitted to the Copyright Office on December 6, 2001).

Of course, the parties' interpretation with respect to the scope of the Section 115 license is not binding on the Copyright Office or the courts. It merely represents their mutual understanding of the scope of the Section 115 license as a term of their privately negotiated license, an understanding that I believe is not shared by everyone in the world of online music services. This is an issue that I will address in the rulemaking proceeding concerning digital phonorecord deliveries, and it is quite possible that I will reach a different interpretation as to what falls within the scope of the license, especially with respect to on-demand streams.

The critical question to be decided is whether an on-demand stream results in reproductions that reasonably fit the statutory definition of a DPD, and creates a "phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient," as required by law. Unless it does so, such reproductions cannot be reasonably considered as DPDs for purposes of Section 115, no matter what position private parties take within the four corners of their own agreement. What is more clear is that the delivery of a digital download, whether limited or otherwise, for use by the recipient appears to fit the statutory definition, since it must result in an identifiable reproduction in order for the recipient to listen to the work embodied in the phonorecord at his leisure.

b. Possible legislative solutions

The Section 115 compulsory license was created to serve the needs of the phonograph record industry and has operated reasonably well in governing relationships between record companies and music publishers involving the making and distribution of traditional phonorecords. However, the attempt to adapt the mechanical license to enable online music services to clear the rights to make digital phonorecord deliveries of musical works has been less successful. With respect to problems involving the requirement that licensees give notice to copyright owners of their intention to use the compulsory license, I believe that I have exhausted the limits of my regulatory authority with the notice of proposed rulemaking published today. With respect to problems involving the scope and treatment of activities covered by the Section 115 compulsory license, I may soon be able to resolve some of the issues in the pending rulemaking on incidental digital phonorecord deliveries, but it seems clear that legislation will be necessary in order to create a truly workable solution to all of the problems that have been identified.

At this point in time, I do not have any specific legislative recommendations, but I would like to outline a number of possible options for legislative action. I must emphasize that these are not recommendations, but rather they constitute a list of options that should be explored in the search for a comprehensive resolution of issues involving digital transmission of musical works. I certainly have some views as to which of these options are preferable, and in many

cases those views will be apparent as I describe the options. I would be pleased to work with the Subcommittee and with composers, music publishers, record companies, digital music services and all interested parties in evaluating these and any other reasonable proposals.

The options that should be considered fall into two distinct categories: (1) legal questions concerning the scope of the Section 115 license, and (2) technical problems associated with service of notice and payment of royalty fees under the Section 115 license.

Among the options that should be considered relating to the scope of the license are:

- **Elimination of the Section 115 statutory license.** Although the predecessor to Section 115 served as a model for similar provisions in other countries, today all of those countries, except for the United States and Australia, have eliminated such compulsory licenses from their copyright laws. A fundamental principle of copyright is that the author should have the exclusive right to exploit the market for his work, except where this would conflict with the public interest. A compulsory license limits an author's bargaining power. It deprives the author of determining with whom and on what terms he wishes to do business. In fact, the Register of Copyrights' 1961 Report on the General Revision of the U.S. Copyright Law favored elimination of this compulsory license.

I believe that the time has come to again consider whether there is really a need for such a compulsory license. Since most of the world functions without such a license, why should one be needed in the United States? Is a compulsory license the only or the most viable solution? Should the United States follow the lead of many other countries and move to a system of collective administration in which a voluntary organization could be created (perhaps by a merger of the existing performing rights organizations and the Harry Fox Agency) to license all rights related to making musical works available to the public? Should we follow the model of collective licenses in which, subject to certain conditions, an agreement made by a collective organization would also apply to the works of authors or publishers who are not members of the organization? Will the creation of new digital rights management systems make such collective administration more feasible?

In fact, we already have a very successful model for collective administration of similar rights in the United States: performing rights organizations (ASCAP, BMI and SESAC) license the public performance of musical works - for which there is no statutory license - providing users with a means to obtain and pay for the necessary rights without difficulty. A similar model ought to work for licensing of the rights of reproduction and distribution.

As a matter of principle, I believe that the Section 115 license should be repealed and that licensing of rights should be left to the marketplace, most likely by means of collective administration. But I recognize that many parties with stakes in the current system will resist this proposal and that there would be many practical difficulties in implementing it. The Copyright Office would be pleased to study the issue and prepare a report for you with recommendations, if appropriate. Meanwhile, there are a number of other options for legislative action that merit consideration.

- **Clarification that all reproductions of a musical work made in the course of a digital phonorecord delivery are within the scope of the Section 115 compulsory license.** This may well be something that I will be able to do in

regulations issued in the pending rulemaking on incidental phonorecord deliveries, but if I conclude that it is beyond my power to reach that conclusion under current law, consideration should be given to amending Section 115 to provide expressly that all reproductions that are incidental to the making of a digital phonorecord delivery, including buffer and cache copies and server copies, [9] are included within the scope of the Section 115 compulsory license. Consideration should also be given to clarifying that no compensation is due to the copyright owner for the making of such copies beyond the compensation due for the ultimate DPD.

- **Amendment of the law to provide that reproductions of musical works made in the course of a licensed public performance are either exempt from liability or subject to a statutory license**. When a webcaster transmits a public performance of a sound recording of a musical composition, the webcaster must obtain a license from the copyright owner for the public performance of the musical work, typically obtained from a performing rights organazation such as ASCAP, BMI or SESAC. At the same time, webcasters find themselves subject to demands from music publishers or their representatives for separate compensation for the reproductions of the musical work that are made in order to enable the transmission of the performance. I have already expressed the view that there should be no liability for the making of buffer copies in the course of streaming a licensed public performance of a musical work. See U.S. Copyright Office, DMCA Section 104 Report 142-146 (2001); Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, Oversight Hearing on the Digital Millennium Copyright Act Section 104 Report, December 12-13, 2001. I have also pointed out that it is inconsistent to provide broadcasters with an exemption in Section 112(a) for ephemeral recordings of their transmission programs but to subject webcasters to a statutory license for the functionally similar server copies that they must make in order to make licensed transmissions of performances. DMCA Section 104 Report, U.S. Copyright Office 144 n. 434 (2001). In this respect, the playing field between broadcasters and webcasters should be leveled, either by converting the Section 112(a) exemption into a statutory license or converting the Section 112(e) statutory license into an exemption.

I can also see no justification for providing a compulsory license which covers ephemeral reproductions of sound recordings needed to effectuate a digital transmission and not providing a similar license to cover intermediate copies of the musical works embodied in these same sound recordings, but that is what Section 112 does in its current form. Parallel treatment should be offered for both the sound recordings and the musical works embodied therein which are part of a digital audio transmission.

- **Expansion of the Section 115 DPD license to include both reproductions and performances of musical works in the course of either digital phonorecord deliveries or transmissions of performances,** *e.g.,* in the course of streaming on the Internet. As noted above, many of the problems faced by online music services arise out of the distinction between reproduction rights and performance rights, and the fact that demands are often made upon services to pay separately for the exercise of each of these rights whether the primary conduct is the delivery of a DPD or the transmission of a performance. Placing both uses under a single license requiring a single payment - a form of "one-stop shopping" for rights - might be a more rational and workable solution.

Among the options that have been proposed relating to service of notice and payment of royalty fees under the Section 115 license are suggestions by users who have expressed their frustration with the cumbersome process involved in securing the Section 115 license, including:

- **Adoption of a model similar to that of the Section 114 webcasting license, requiring services using the license to file only a single notice with the Copyright Office stating their intention to use the statutory license with respect to all musical works.** Section 115 currently requires the licensees to serve notices identifying each musical work for which they intend to make and distribute copies under the compulsory license. This system has worked fairly well and is sensible with respect to the traditional mechanical license, but do such requirements make sense for services offering DPDs of thousands of musical works? The current system does have the virtue of giving a copyright owner notice when one of its works is being used under the compulsory license. Removing that requirement would mean that a copyright owner would find it much more difficult to ascertain whether a particular work owned by that copyright owner is being used by a particular licensee under the compulsory license. However, removing that requirement would avoid - or at least defer - the problems compulsory licensees currently have in identifying and locating copyright owners of particular works. The problems might be only deferred rather than avoided because the licensee would still have to identify and locate the copyright owner in order to pay royalties to the proper person - at least when the copyright owner has registered its claim in the musical work.

- **Establishment of a collective to receive and disburse royalties under the Section 115 license.** Again, Section 114 may provide a useful model. Royalties under the Section 114 statutory license, which are owed to copyright owners of sound recordings rather than of musical works, are paid to SoundExchange, an agent appointed through the CARP process to receive the royalties and then to disburse them to the copyright owners. Such a model might be worth emulating under the Section 115 license, especially if the requirement of serving notices of intention to use the compulsory license on copyright owners is abandoned. While such a scheme offers obvious benefits to licensees, copyright owners (and, in particular, those copyright owners who are readily identifiable under the current system) might find themselves receiving less in royalties than they receive under the current system, since administrative costs of the receiving and disbursing entity presumably would be deducted from the royalties and the allocation of royalties might result in some copyright owners receiving less than they would receive under the current system, which requires that each copyright owner be paid precisely (and directly) the amount of royalties derived from the use of that copyright owner's musical works.

- **Designation of a single entity, like the Copyright Office, upon which to serve notices and make royalty payments.** I am skeptical of the benefits of this approach, which would shift to the Copyright Office the burden of locating copyright owners and making payments to them. The administrative expense and burden would likely be considerable, and giving a government agency the responsibility to receive such finds, identify copyright owners and make the appropriate payments to each copyright owner is probably not the most efficient means of getting the royalties to the persons entitled to them.

- **Creation of a complete and up-to-date electronic database of all musical works**

registered with the Copyright Office. I suspect that proponents of this solution have very little knowledge of the difficulty and expense that would be involved in creating an accurate and comprehensive list of owners of copyrights in all musical works. Determining who owns the copyright in a particular work is not always a simple matter. Someone reviewing the current Copyright Office records to determine ownership of a particular work would have to search both the registration records and the records of documents of transfer that are recorded with the Office. While basic information about post-1977 registrations and documents of transfer is available through the Office's online indexing system, in any case where ownership of all or some of the exclusive rights in a work have been transferred it would be necessary to review the copy of the actual document of transfer maintained at the Copyright Office (and not available online) to ascertain exactly what rights have been transferred to whom. Chain of title can often be complicated. Addresses of copyright owners are not available in the Office's online indexes. And the information in the Office's current registration and recordation systems could not easily be transformed into a database containing current copyright ownership information. Moreover, neither registration nor recordation of documents of transfer is required by law; therefore, there are many gaps in the Office's records. Where there is a record, it is not necessarily up to date. It is difficult to fathom how the Office could create an accurate, reliable and comprehensive database of current ownership of musical works. While the registration and recordation system works reasonably well when a person is seeking information on ownership of a particular work, such information must usually be interpreted by a lawyer (especially if there have been transfers of ownership). The system is not well-suited for the type of large-scale licensing of thousands of works in a single transaction that is desired by online music services.

- **Shifting the burden of obtaining the rights to the sound recording copyright owner.** Online music services generally transmit performances or DPDs of sound recordings that have already been released by record companies. The record company already will have obtained a license - either directly from the copyright owner of the musical work that has been recorded or by means of the section 115 statutory license - for use of the musical work. The record company may well have already obtained a section 115 license to make DPDs of the musical work as well, and one would expect that this will increasingly be the case. Because record companies already have substantial incentives and presumably have greater ability to clear the rights to the musical works that they record, consideration should be given to permitting online music services - who must obtain the right to transmit phonorecords of the sound recording from the record company in any event - see 17 U.S.C. §115(c)(3)(H)(i) (quoted above in footnote 7) - to stand in the shoes of the record company as beneficiaries of the compulsory license for DPDs. The online music company could make royalty payments to the record company for the DPDs of the musical works, and the record company (which might charge the online music company an administrative fee for the service) could pass the royalty on to the copyright owner of the musical work. As noted above, Section 115(c)(3)(I) already appears to permit the record company to license the right to make DPDs of the musical compositions to other online music services. Clarification of this provision and expansion to provide for funneling royalty payments through the record companies might lead to more workable arrangements.

- **Creation of a safe harbor for those who fail to exercise properly the license during a period of uncertainty arising from the administration of the license for the making of DPDs.** Under current law, a person who wishes to use the Section 115

compulsory license must either serve the copyright owner with a Notice of Intention if he can identify and locate the copyright owner based on a search of Copyright Office records or file a Notice of Intention with the Copyright Office if he cannot so identify or locate the copyright owner. While the expenses involved in this process may be considerable, it is hard for me to agree that there is uncertainty about how to comply with the license. On the other hand, currently Section 115 exacts a harsh penalty for those who fail to serve the Notice of Intention or make royalty payments in a timely fashion: they are forever barred from taking advantage of the compulsory license with respect to the particular musical work in question. I have reservations about creating a "safe harbor" for the making of unauthorized DPDs during a time when a service has failed to comply with the requirements of the license, but I believe consideration should be given to affording a service the opportunity to cure its default and use the compulsory license prospectively, even if the service is liable for copyright infringement for the unauthorized transmissions made prior to the service's compliance.

Extension of the period for effectuating service on the copyright owner or its agent beyond the 30 day window specified in the law. There is merit in this proposal, especially in light of the current provision that absolves a licensee from making payments under the statutory license until after the copyright owner can be identified in the registration or other public records of the Copyright Office. Difficulties in ascertaining the identities and addresses of the copyright owners may also justify a more liberal approach. I could imagine a system that, for example, required a service to serve the copyright owner with a Notice of Intention within 30 days of the service's first use of the musical work or within one year of the time when the copyright owner is first identified in the records of the Copyright Office - whichever date is later - but with an obligation to make payments retroactive to the date on which the copyright owner was first identified in the Copyright Office records. Under such a system, services would only have to search the Office's records once a year in order to avoid liability for failing to have ascertained that a copyright owner's identity has become available in the Office's records.

- **Provision for payment of royalties on a quarterly basis rather than a monthly basis**. It is my understanding that most licenses *negotiated* with copyright owners under Section 115 (e.g., the licenses given by the Harry Fox Agency in lieu of actual statutory licenses) provide for quarterly payments rather than the monthly payments required under the compulsory license. It is also my understanding that one of the reasons for the statutory requirement of monthly payments, as well as some of the other statutory requirements, was a determination that use of the compulsory license should only be made as a last resort, and that licensees should be encouraged to obtain voluntary licenses directly from the copyright owners or their agents, who would offer more congenial terms. Users might find a requirement of quarterly payments rather than monthly payments to be beneficial, but copyright owners presumably would prefer to receive their payments more promptly; moreover, if a licensee defaults on payment, a quarterly payment cycle would be more disadvantageous to the copyright owner than a monthly cycle. Amending Section 115 to require quarterly payments might lead many more licensees to elect to obtain statutory licenses rather than deal directly with publishers or their agents. Consideration should be given to whether that would be desirable.

Provision for an offset of the costs associated with filing Notices with the Office in those cases where the copyright owner wrongfully refuses service. In

general, I believe that persons using a statutory license should bear the cost associated with obtaining the license. However, if the copyright owner has wrongfully refused to accept service of a Notice of Intention, there is something to be said for the notion of shifting those additional costs incurred by the licensee as a result of the wrongful refusal.

In general, I do support the music industry's attempt to simplify the requirements for obtaining the compulsory license and its desire to create a seamless licensing regime under the law to allow for the making and distribution of phonorecords of sound recordings containing musical works.

However, the need for extensive revisions is difficult to assess. Prior to the passage of the DPRA, each year the Copyright Office received fewer than twenty notices of intention from those seeking to obtain the Section 115 license. Last year, two hundred and fourteen (214) notices were filed with the Office, representing a significant jump in the number of notices filed with the Office over the pre-1995 era. Yet, the noted increase represents only 214 song titles, a mere drop in the bucket when considered against the thousands, if not hundreds of thousands, of song titles that are being offered today by subscription music services. While we acknowledge that this observation may merely reflect the reluctance of users to use the license in its current form to clear large numbers of works, as well as the fact that users may file with the Office only when our records do not provide the identity and current address of the copyright owner, it may also represent the success of viable marketplace solutions.

Certainly we have heard few complaints about the operation of Section 115 in the context of the traditional mechanical license. To the extent that reform of the license is needed, it may be that the traditional mechanical license should be separated from the license for DPDs, and that two different regimes be created, each designed to meet the needs of both copyright owners and the persons using the two licenses.

In any event, the critical issue centers on clarifying the scope of the compulsory license in the digital era. I have outlined only a few possible approaches to reform of the Section 115 compulsory license. While there is a clear need to correct some of the deficiencies in Section 115, I believe that it is important for all the interested parties - copyright owners, record companies, online music services and others - to work together to evaluate various alternative solutions in the coming months. I commend you, Mr. Chairman, for convening this hearing to discuss the problems associated with the use of the Section 115 license in a digital environment, and I look forward to working with you, members of the Subcommittee, and the industries represented at this table to find effective and efficient solutions to make the Section 115 compulsory license available and workable to all potential users and strike the proper balance between their needs and the rights of the copyright owners.

---

1. The music industry construed the reference in Section 1(e) of the 1909 Act as referring only to a nondramatic musical composition as opposed to music contained in dramatico-musical compositions. See Melville B. Nimmer, Nimmer on Copyright, § 16.4 (1976). This interpretation was expressly incorporated into the law by Congress with the adoption of the 1976 Act. 17 U.S.C. §115(a)(1).

2. 209 U.S. 1 (1908).

3. Congress intended the term "made" "to be broader than 'manufactured' and to include within its scope every possible manufacturing or other process capable of reproducing a sound recording in phonorecords." H. Rep. No. 1476, at 110 (1976).

4. For purposes of Section 115, "the concept of 'distribution' comprises any act by which the person exercising the compulsory license voluntarily relinquishes possession of a phonorecord (considered as a fungible unit), regardless of whether the distribution is to the public, passes title, constitutes a gift, or is sold, rented, leased, or loaned, unless it is actually returned and the transaction cancelled." Id.

5. This provision replaced the earlier requirement in the 1909 law that a copyright owner must file a otice of use with the Copyright Office in order to be eligible to receive royalties generated under the compulsory license.

6. In 1993, Congress passed the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. 103-198, 107 Stat. 2304, which eliminated the Copyright Royalty Tribunal and replaced it with a system of *ad hoc* Copyright Arbitration Royalty Panels (CARPs) administered by the Librarian of Congress.

7. "A digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, unless-

> (I) the digital phonorecord delivery has been authorized by the copyright owner of the sound recording; and
>
> (II) the owner of the copyright in the sound recording or the entity making the digital phonorecord delivery has obtained a compulsory license under this section or has otherwise been authorized by the copyright owner of the musical work to distribute or authorize the distribution, by means of a digital phonorecord delivery, of each musical work embodied in the sound recording."

17 U.S.C. §115(c)(3)(H)(i).

8. The fee for the filing of Notices of Intention may be changed only after a study has been made of the costs connected with the filing and indexing of the Notices. The fee adjustment must be submitted to Congress and may be instituted only if Congress has not enacted a law disapproving the fee within 120 days of its submission to Congress. 17 U.S.C. §708(a)(5), (b).

9. Technically, these are phonorecords rather than copies. See 17 U.S.C. §101 (definitions of "copies" and "phonorecords"), but terms such as "buffer copy" and "server copy" have entered common parlance.

U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000
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Revised: 31-Jan-2005

EXHIBIT CO 0515

For Immediate Release
April 29, 2004
http://www.riaa.com

Contact: Amy Weiss
Jonathan Lamy
202-775-0101

Testimony of Mitch Bainwol,
Chairman and CEO, Recording Industry Association of America (RIAA)
Before U.S. Senate Committee on Appropriations
Subcommittee On Commerce, Justice, State and the Judiciary
April 29, 2004

Mr. Chairman, Members of the Subcommittee. Thank you for focusing Congress' attention on the devastating impact of piracy and the steps government can take to address this enormous problem.

I'm the Chairman and CEO of the Recording Industry Association of America. Our members create, manufacture and or distribute 90 percent of all legitimate sound recordings produced and sold in the U.S. In 03, the U.S. represented just under 40 percent of a $32 billion, 2.7 billion unit global market.

The '80s and '90s were terrific decades for music sales. Domestic revenues soared from less than $4 billion in 1980 to almost $15 billion in 1999. The global pattern was similar: sales in 1980 of $11 billion rising to $39 billion in 1999. And then things went south.

Part of the explanation is the pervasiveness of international piracy perpetrated the old-fashioned way – factory produced cassettes and CDs. But there were two new and more salient triggers.

First, the enormous wave of illegal file sharing that began with the original centralized Napster and was followed by a surge of decentralized peer to peer networks; and, second, the widespread proliferation of CD burners that made is so very easy to reproduce high quality sound recordings.

We found ourselves in a rapidly evolving environment defined by: (1) widespread ambiguity about what you can and can't do to share music; and (2) a dramatic decline in the barriers to entry for piracy. With either a CD burner for physical piracy or a home

computer hooked up to the Internet for online peer-to-peer piracy -- increasingly over broadband -- it became easier than ever to get music without paying for it.

In rough terms, the combination of growing global physical piracy, easier Internet piracy and illegal CD burning contributed to a 20 percent sales decline since 1999.

The impact of the revenue crash has been profound, in human and creative terms. Successive rounds of job losses...1000 jobs lost at Warner in March of this year. Several weeks ago at EMI, another 1500 jobs lost. Last year at Sony, about 1000 jobs. 1500 jobs lost at Universal in less than 2 years. Major losses at BMG as well. None of this takes into account the additional job losses associated with the closure of literally thousands of retail stores.

Yet the creative cost is even more troubling. Artist rosters have been slashed dramatically as companies no longer can afford to carry as many dreams. Piracy robs industry of the capital it needs to invest. The result? Fewer artists are finding the financial support they need to put food on their table. The path to artistic success in music has never been linear, speedy or terribly predictable. A performer can break with the release of their first album – or years into their careers.

In today's world, however, smaller rosters accommodate fewer aspiring performers. The price? Perhaps the next Nora Jones. Or Billy Joel. Or Willie Nelson. Or the next Beyonce.

Regarding the ONLINE problem, the most important thing this Congress can do is recognize the true nature of this economic challenge. It isn't a case of digital versus plastic, content versus technology or old versus new. It IS a case of legitimate versus illegitimate.

Shine the spotlight; here's what you'll find.

The legitimate industry pays taxes, provides jobs, contributes positively to our trade balance, labels our content and compensates songwriters and performers. Unfailingly, the industry helps bring to the market great new product that enriches the lives of fans everywhere.

The illegitimate industry hijacked a neutral technology – P2P. They don't pay taxes, don't provide jobs, don't impact trade, don't label or even effectively shield kids from pornography...and they certainly don't pay songwriters or artists. Moreover, these networks compromise user privacy, jeopardize computer security, and induce illegal copyright infringement without anything even remotely resembling adequate disclosure. New product? That's not part of their business.

Shine that spotlight. Cut through the fog they hide behind. Demand accountability. And help us educate parents, teenagers and pre-teens how to enjoy music in ways that preserve the future of the creative enterprise. There will always be technical methods for

stealing songs; so our joint task is to send a message that IP matters, that the future of music for creators and fans alike is predicated on the simple principle that you should pay for what you get.

While nothing is more vital than sending the right message, enforcement is a pretty close second.

So we were greatly heartened last week by "Operation Fastlink." Attorney General Ashcroft and his team deserve great credit for this unprecedented 10 country crackdown on the pre-release ripping groups that make it sport to steal property even before it becomes commercially available. We think there is real promise to the new Justice Task Force on these matters under the able leadership of David Israelite.

And we were delighted with the recent announcement by the U.S. China Joint Commission on Commerce and Trade. USTR and the Commerce Department were instrumental in achieving tangible, specific commitments from the Chinese.

Moving forward, we think it wise that Congress seek to elevate the status of international IP protection and offer these specific suggestions:

1. Elevate the status of trade-related IP at USTR by creating a special Ambassador for intellectual property.
2. Consider separating out from the USTR office that manages services and investment issues a stand-alone IP office with sufficient staffing to ensure the obligations made by our trading partners are honored.
3. Ensure that Commerce, PTO and State have adequate resources to assist USTR on these issues. USTR is tiny; at just 200 people, they can't do it alone.
4. Consider elevating the State Department's Intellectual Property Division to "Office-level" status
5. Extend and expand the $2.5 million INL allocation in the State Department's budget for IPR capacity building in other countries.

On behalf of the music community, we appreciate your focus on the piracy problem and welcome the opportunity to work with the Senate.

# # # # #

EXHIBIT CO 0516

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In The Matter Of:	:	
	:	Docket No. 2005-1 CRB DATA
Digital Performance Right in Sound Recordings and Ephemeral Recordings	:	

WITNESS STATEMENT OF KARYN ULMAN

1. My name is Karyn Ulman. I have been in the business of clearing and licensing music rights for 30 years. I offer this testimony insofar as it may be helpful to the Copyright Royalty Board in this proceeding.

2. I began my career in New York in 1974 at April Blackwood Music Publishing, and then worked at Columbia Records starting in 1976 until moving to California. Upon moving to California, I joined music publishing company Hal David, Inc., where I did licensing work for two years before joining the Hanna Barbara Production Company of Taft Entertainment in 1978.

3. I eventually moved up to the parent company at Taft, where I served as Senior Vice President of Music, and was in charge of the music supervision, music clearance and music publishing departments. From 1988 to 1994, I worked as a consultant specializing in music publishing administration for film and record companies. This work included deal development and contract negotiations on behalf of record labels to secure publishing rights and licenses. From 1995 to 2002, I was Vice President and then Senior Vice President for DIC Entertainment, LLC and DIC Music, LLC, where my responsibilities included overseeing all the

music licensing and music business affairs related to recording and producing scores and songs, as well as licensing compositions and sound recording masters for inclusion in television and home video projects and soundtrack albums.

4. In 2002, I became a consultant to Music Reports, Inc. and thereafter became Vice President for Licensing and Senior Vice President at Copyright Clearinghouse, Inc. There I represented clients in various licensing transactions with music publishers and record labels to secure reproduction and performance right licenses. In 2004, I moved to eMusic.com, as the Vice President for Music Licensing, where I trained and supervised a ten-person team in Internet music research and licensing of digital media rights. In October 2005, I returned to Music Reports, Inc.

5. My career has exposed me to many facets of the music rights and licensing marketplace, both from the perspective of rights holders and licensees. I am very familiar with the considerations involved – on both sides of the table – in arriving at license fees for the use of musical compositions and sound recordings, as well as their comparative values in various types of contexts (film, television, online, etc.)

6. I have been asked by the Digital Media Association ("DiMA") what relationship, if any, there exists as between the fees that one would expect to observe in the licensing market for what are known as "synch" rights licenses and "master use" licenses associated with the use of the same tracks in a given theatrical film or tv show. Both types of licenses typically are required when a producer chooses to use a prerecorded sound recording in a film or tv show: the "master use" license governs the reproduction of a sound recording into the film/tv show; and the "synch" (or synchronization) license governs the reproduction into the

film/program of the underlying musical work (i.e. the composition) embodied in that same sound recording.

7. The synch right and master use right are independent rights controlled by different rights owners or their agents: the master use right typically is controlled by a record company and the synch right is owned by a music publisher. The movie/tv producer seeking licenses must conduct separate negotiations with each of the sound recording owner and the publisher.

8. Although these negotiations occur independently, the license fees payable for master use rights and synch rights associated with their simultaneous use in a motion picture or TV show almost invariably are of the same (or substantially the same) amount. While there are some exceptions every now and then, it is almost always the case that the licensing fee paid to a record company for the master use license is substantially the same as the fee paid to the music publisher for the corresponding synch license to the underlying musical work.

9. Indeed, over the last several years, this result has been effectively ensured by the common use of most-favored-nation ("MFN") clauses in these types of music licensing transactions by record companies and publishers alike. It is now common for a publisher of a musical composition to demand that the producer/licensee agree that, if the producer later agrees to pay more for a master use license for the corresponding sound recording than it agreed to pay for the associated composition, it must retroactively pay the same amount for use of the composition (so the synch fee is "no less" than the master use fee). Meanwhile, it is also now typical for the licensor of master use rights to demand reciprocal MFN treatment (thus ensuring that if a producer agrees to pay more for a synch license, the producer will have the obligation to adjust the master use fee up to the same amount).

10. I have reviewed the witness statement of Dr. Adam Jaffe submitted as written rebuttal testimony in the prior copyright arbitration proceedings involving the same subject matter as is presently before this Copyright Royalty Board. Specifically, he addressed the parity in treatment that record labels and music publishers typically seek with respect to the sound recording and the underlying musical work in the course of licensing master use and synch rights in the television and motion picture industries. Based on my years of experience in this area, and based on information available to me regarding current practices, I can confirm that Dr. Jaffe's testimony on this subject was accurate and consistent with industry practices in 2001, and that there has been no material change in those practices since then. Indeed, the regular use of MFN clauses as between master rights holders (record labels) and synch rights holders (the music publishers) effectively ensures that result.

I declare under the penalty of perjury that the foregoing is true and correct.

_____

Karyn Ulman

EXHIBIT CO 0517

Music Biz Academy.com

Taking a Glance at New Media Deals in the Music Industry

*by Dina LaPolt, Esq.** - August 2005

Back to The Academy

It seems as though music is now available everywhere. Today, music is available through digital download services such as *iTunes* and *Napster*; streaming interactive subscription services inlcuding *Rhapsody* and *MusicNet,* as well as non-interactive subscription services via *MusicChoice*, *Sirius,* and *XM Satellite*; through video games such as *Grand Theft Auto* and *Madden Football,* as well as through your cell phone. Below are the descriptions for some these new formats and the breakdown of some of the income paid to the artists and songwriters.

Digital Downloads

Although there are numerous digital download services available throughout the world, the most prominent seems to be Apple's *iTunes*. Through mass marketing campaigns that extend throughout the world, which feature such globally recognized artists as U2 and the Black Eyed Peas, *iTunes* is offered via both PC and Mac computers, then downloaded to a handheld device called an *iPod*. As of January 2004, *iTunes* reported a whopping 250 million downloads! 135 million of these were downloaded in the United States and *iTunes* reports a current average of more than 1.25 million downloads per day. Pursuant to the *iTunes* agreement with the record labels, the *iTunes* share of income is $0.34 cents out of each $0.99 download.

The following sets forth the way in which some record labels, most certainly the major labels (i.e., Universal, Sony-BMG, EMI and Warner Bros), pay third parties with respect to each $0.99 download, assuming that the recording agreement allocated the artist an "all in" royalty rate of 15% (i.e. which includes a producer royalty of 3%, leaving a "net artist" rate of 12%):

Artist iTunes Royalty
$0.99 download single song price to the consumer
less $0.34 to Apple
left **$0.65 x 130% (wholesale markup)**
x 12% (net artist net rate) = $0.10

Producer iTunes Royalty
$0.99 download single song price to the consumer
less $0.34 to Apple

Our Top 20 Articles
How to Write an Artist Bio
Improve Your Press Kit
21 Songwriting Tips
Performance Contracts
Sell Your CDs Online
What's a Record Deal About?
Mastering Your Music
Inside Record Labels
A Legal Checklist
Starting a Music Business
How to Write a Press Release
Guerrilla Marketing Tips

left $0.65 x 130% (wholesale markup)
x 3% (producer rate) = $0.025

Some record labels take this even further by first deducting the mechanical royalty off of the $0.65 cents prior to calculating the *iTunes* royalty, which is then paid to the artist and the producer, resulting in a lower royalty rate.

See the following:

Artist iTunes Royalty
$0.99 download single song price to the consumer
less $0.34 to Apple
left **$0.65 *less* a digital mechanical royalty of** $0.085 cents
left $0.565 x 130% (wholesale markup)
x 12% (net artist net rate) = $0.088

Producer iTunes Royalty
$0.99 download single song price to the consumer
less $0.3 to Apple
left **$0.65 *less* a digital mechanical royalty of** $0.085 cents
left $0.65 x 130% (wholesale markup)
x 3% (producer rate) = $0.022

One major label in particular goes so far as to take a packaging deduction!

With respect to mechanical royalties paid for digital distributions of musical compositions, record companies in the U.S. have been using a notice of compulsory license when notifying music publishers of their intention to offer digital downloads of musical compositions. This 'notice' usually lists the record company, the recording artist, the name of the musical composition, the identity of the songwriters and music publishers and the expected distribution date of the 'digital phonograph delivery' of the song. These compulsory licenses are typically referred to as "DPD Licenses" and they are paid at the maximum statutory rate, which is currently 8.5 cents for songs under 5 minutes or 1.65 cents per minute if the song is over 5 minutes. For recordings produced pursuant to contracts entered after 1995, the law prohibits a controlled composition provision of the artists' contract from discounting the compulsory DPD rate, so even if there is a controlled composition clause in the contract, the singer-songwriter should receive the entire 8.5 cents.

Can Unsigned Artists be digitally distributed through iT*unes*?

An artist who has not signed to a major or independent record label can still get their music distributed via *iTunes* by a number of various companies now affiliated with Apple. The two that I will mention in this article are CCBaby.com and iFanz.com. Out of the $0.65 cents left over after Apple takes its $0.34 share, Cdbaby.com only takes a 9% fee off each download, passing along to its artists a whopping 91% of the income! iFanz charges 40% per download. In both cases, the artist is responsible for all third party payments, including any royalties payable to producers of the recordings and digital mechanical royalties, which are paid to owners and/or controllers of the musical compositions contained on each recording.

With respect to digital mechanical royalties, the online service (i.e. *iTunes)*, like a physical retailer, pays these royalties to the record

Facts About Music Licensing
How to Make a Living w/ Music
Record Distribution: 25 Tips
Reasons Demos Are Rejected
Artist/Band Interview Form
Planning A Radio Campaign
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companies (who own and control the recordings containing the songs), who in turn pays either the songwriters, music publishers or the Harry Fox Agency, who in turn pays the music publishers.

Internet Interactive Subscription Services

Two notable interactive music subscription services are *Rhapsody* (through RealNetworks) and *Napster,* both of which offer continuous interactive streaming music, which also allows the user to download tracks to a CD for a separate fee, sometimes as low as $0.79 per download. These services are considered "interactive" because the consumer can interact with the service to hear a specific recording and to create personalized radio stations and play lists. Specifically, with respect to *Rhapsody,* once logged on, it plays all day long. The user can create personalized radio stations such as *Classic Rock Vault* and *Ultra Chill*. To create a personalized radio station, the user designates up to ten artists for each respective customized radio station and the 'personalized station' plays those particular artists - plus any other artists *like* those particular artists - all day long. This service costs $24.99 per quarter (i.e. four times per year) or $9.99 per month. Although some artists are notably missing (like The Beatles and AC/DC), *Rhapsody* is rapidly increasing its content every day. Generally, these services pay $0.01 (i.e. 1 cent) to the record label each time a recording is streamed. Since this is licensing revenue, the label should split this amount with the featured artist.

For subscribers, *Rhapsody* announced a service similar to the widely popular *Napster to Go* for a monthly fee of $14.99, where subscribers can download as many records offered by the service as they would like onto certain portable devices (notably, not the iPod). The subscriber maintains access to the recordings for as long as he or she retains the monthly membership.

For the non-subscriber, *Rhapsody* just introduced a version of its software that allows non-subscribers to listen to 25 songs for free each month. Users are welcome to listen to one song 25 times or any 25 songs from its extensive library once. *Rhapsody* hopes that making it as easy to obtain songs illicitly through a file-sharing network like KaZaA will draw new paying customers. "Today, the number of people who use legal services are in the millions, and the number of people who use pirate services is in the tens of millions," says Rob Glaser, Real Networks' chief executive. Accordingly, to compete, *Rhapsody* is attempting to fight 'free' with 'free.'

Although permanent royalty rates are still being worked out between the record labels and some of their artists as the industry evolves more into the digital realm, a partial list of interactive digital subscription services and information pertaining to approximate royalty rates and fees can be found by logging onto www.cdbaby.net. Once logged on, click on "Sell Your Downloads" and then click on "companies" on the left side of the page.

Internet Radio Stations and Non-Interactive Subscription Services

Most of the prominent terrestrial radio stations have corresponding Internet radio stations that broadcast the station over the Internet waves. Under the Digital Millennium Copyright Act of 1995, Congress provided for a Webcasting Royalty to be paid to the owners or controllers of the recordings being streamed. This Webcasting Royalty is only paid for "non-interactive" radio and subscription services. Unlike *Rhapsody* and *Napster's* interactive services, the consumer cannot pick and choose

that can't be found anywhere else. More...

which particular songs or artists they want to hear.

The two FCC-approved non-interactive satellite digital subscription services are XM Satellite and Sirius. With respect to Sirius, it charges a nominal activation fee of $15 and costs $12.95 per month thereafter. Both of these digital subscription services stream music in virtually every genre to listeners seven (7) days a week-twenty four (24) hours a day. Accordingly, the listener can choose to listen to *Smooth R&B* and that station will play such artists as Al Green, Ray Benson, and Toni Braxton continuously without any commercial interruption. In addition to Sirius and XM, there are also non-interactive music subscription services available via most digital cable television lines. These services are MusicChoice, DMX or Muzak.

All of these services must pay the statutory performance license fees for the master recording, as discussed below, and must also pay the performance rights organizations for the performance of the musical compositions.

Public Performance Royalties for Internet Licenses

The Master Recording
With respect to the non-interactive subscription services and Internet radio stations, SoundExchange collects money for owners and controllers of the master recordings and featured artists.

SoundExchange is the first performing rights organization in the U.S. to collect and distribute royalties to sound recording copyright owners and featured artists. SoundExchange is a not-for-profit organization governed by a board of both artist representatives and major and independent label representatives. The law provides that the statutory license revenues be split:

- 50% to the owner of the master recording (i.e., most often the record company)
- 45% to the featured artist
- 5% to the non-featured musicians and vocalists (through the AFM and AFTRA Intellectual Property Rights Distribution Fund, www.raroyalties.org)

SoundExchange receives license revenues from satellite, cable and Internet radio, with licenses for both commercial and non-commercial services, which include track level accounting of performances to its members and the most up-to-date information on streaming and digital transmissions. More information can be found at Sound Exchange.

The Musical Composition
With respect to the musical composition, there are three (3) performing rights organizations in the U.S. -- ASCAP, BMI, and SESAC. ASCAP, BMI, and SESAC collect public performance income with respect to musical compositions and all have various licenses that allow these Internet services, whether interactive or non-interactive, to perform all of the songs in each of their repertory. These Internet licenses do not allow the reproduction or distribution of the songs, nor do they allow the pubic performance of the master recordings (which is handled through SoundExchange).

According to the music business person's bible, ***Music, Money and Success: The Insider's Guide to Making Money in the Music Industry*** *(4th edition)* by Jeffrey Brabec and Todd Brabec, the following applies to the public performance of songs via the Internet: The Brabec brothers point out that a lot of these licenses are still in their 'experimental stages' and urge the songwriter and/or publishers to regularly check the website of their respective performing rights organization to make sure they have the most up-to-date and accurate information.

ASCAP currently offers three (3) types of Internet licenses. The first is a non-interactive license that does not allow consumers to download or otherwise select particular songs. The second type of license is an interactive license that does allow consumers to download or otherwise select particular songs. ASCAP's third type of license authorizes the public performance of its songs in its repertory via wireless devices such as mobile phones. The fees paid to ASCAP by these Internet sites are based on revenue or the activity of each Internet service. For more information, please log on to the ASCAP website at www.ASCAP.com and click on "customer licenses" on the left side of the page.

BMI's main license type is one where fees are computed on a 'gross revenue calculation,' where music is the primary feature of the particular site - or a 'music area calculation,' where music is only a part of the total website traffic for that particular site. For more information, go to www.BMI.com

SESAC also offers licenses that provide for fees based on the number of monthly page requests, as well as whether or not there is advertising on the site. For more information, go to www.SESAC.com

Ringtone Deals in the U.S.

Usually, these agreements are made between a cell phone aggregator (i.e. distributor) and music publishers and/or songwriters for the re-creation (i.e. "replay") of a song either monophonically (archaic) or polyphonically (preferred).

The terms of these agreements are short ranging - from 1 to 3 years. Although most of the deals are worldwide, the music publisher most often will try to limit the deal to the U.S. and Canada.

The way in which the aggregators pay royalties to the owners and controllers of musical compositions in the U.S. is usually the greater of ten cents ($0.10) or ten percent (10%) of the ringtone price paid by the consumer. Accordingly, there is always a floor of ten cents ($0.10) per ringtone, which is a step up from what songwriters and publishers are used to being paid on sales of record albums, pursuant to the statutory rates set by the U.S. Copyright Office. (As stated above, the current minimum statutory rate for record albums is $0.085 cents for under 5 minutes of playing time). Accordingly, if a ringtone sells for $3.00, then the royalty paid to the owners and controllers of that particular musical composition would be $0.30 cents. In addition, most agreements have a 'most favored nations' clause in them, which states that if another music publisher (or songwriter) receives a higher royalty rate for its share of the copyright relating to the ringtone, then the same higher rate shall apply to all. The 'most favored nations' clause will usually apply to all the provisions of the agreement (i.e. term, territory, advances, etc.), not just the royalty rate. Many ringtone agreements are contingent on the company's also obtaining licenses from the respective public performance organization (i.e. ASCAP, BMI or SESAC) and those monies will flow to

the publisher and songwriter as well.

Although the technology in the U.S. is not quite as advanced as the technology available in Asia and the rest of Europe, the U.S. is catching up fast.

In Japan, iMode is one of the leading cell phone aggregators and they boast that they have over 47 millions subscribers. In Europe, Vodaphone is the biggest cell phone aggregator, boasting that they have over 146 million subscribers (this would mean that approximately 1 out of every 4 cell phone users in Europe signed up with Vodaphone). Using 3G technology, iMode and Vodaphone provide customized cell phones which can offer a number of personalized services, such as music shops, music video channels, buying tickets to concerts through mobile ticketing, visual radio, personalized content - such as wallpaper and imaging featuring your favorite artist - and editorial content. Taken from lectures presented by the Mobile Music Forum at the MIDEM Music Business Conference in Cannes, France, in January 2005, the Forum reported that studies show a person takes the following three items each time they leave their house: keys, a purse (or a wallet) and a cell phone. Accordingly, it is only a matter of time before the cell phone becomes the ultimate multimedia device, which will incorporate technology used by other devices such as the iPod and be able to receive streaming services. The ability to receive streaming services on portable devices like cell phones may make devices containing fixed music, like the iPod, unnecessary. In fact, Asia and Europe have been utilizing these types of customized cell phones for several years already.

However, most of what we have in the United States are still only monophonic and polyphonic ringtones, whereby the actual song is recreated through a series of tones - most of them through MIDI (i.e. musical instrument digital interface). According to lectures taken from the Mobile Music Forum at MIDEM, monophonic and polyphonic ringtones generated an estimated 4 billon dollars in 2004. Currently, with the use of the relatively new 3G technology, a consumer in the U.S. can now download the actual master recording to a cell phone, as opposed to downloading a monophonic or polyphonic ringtone. These new types of tones are being referred to in the industry as "truetone masters" or "mastertones." In some Asian countries where cell phone technology is more advanced than in the U.S., revenues from the secondary usage of master recordings (e.g. mastertones, ringtones and ringbacks) have already surpassed revenues from the primary market of recordings.

Video Games

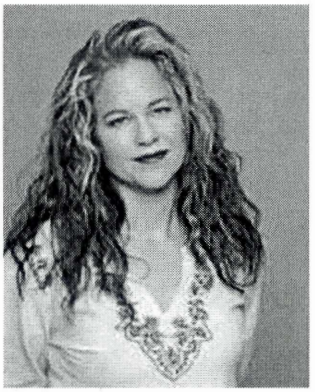
The use of music in video games is becoming a huge source of income for record companies, recording artists, songwriters and music publishers. Although there are a few exceptions, most game companies license music as a 'buy out,' as opposed to paying a royalty per each game sold, as is customary for CDs. Buy outs are somewhere between $5,000 to $10,000 per master recording and $5,000 to $10,000 for the musical composition embodied on the master recording, which is then divided up among the songwriters and/or music publishers, relative to each parties' copyright ownership interest.

Most of these licenses tend to be *short term* - usually spanning 5 to 10 years, with some stating that they are for the 'term of copyright' or for as long the game is being distributed. The territory is usually the world unless the artist has a lot of leverage. Additionally, there may be language

providing for the game to be available online, as well as any other 'new media' format that is developed in the future.

Beware of language in these agreements that grant the game company the right to release the music in the game on an audio-only CD or a DVD. If this language is in the agreement, try to take it out – or, at the very least, try to pre-negotiate the royalties for the CD, for instance obtaining a full mechanical royalty for the song (usually it will be 75% of the statutory rate) and a 'most favored nations' artist royalty rate for the master recording.

By the time this article is published, some of the foregoing may have already changed! The digital realm in the music industry is moving at such a rapid pace – it's almost too hard to keep up! The good news is that there are plenty of new opportunities for artists - both signed and unsigned. The bad news is that all these legitimate services that pay artists are dwarfed by the numbers that use the illegitimate services. Hopefully, as the legitimate services improve, these services will be more attractive than free. Maybe then, the playing field will finally be leveled off!



Dina LaPolt is an entertainment attorney at LaPolt Law, P.C. in Los Angeles. LaPolt Law is a boutique entertainment firm that specializes in representing clients in the music, merchandising, film, television, and book publishing industries. The firm's clientele include recording artists, artist- and producer-owned record companies, music publishers, producers, managers, film production companies, directors, writers, authors, and actors. In addition to practicing law, Dina teaches *"Legal and Practical Aspects of the Recording and Publishing Industries"* in the Entertainment Studies Department at UCLA Extension, she is an instructor of *Music Contracts* at the Musician's Institute in Hollywood, speaks regularly on panels at music industry conferences all over the country, and still has time to perform in her all-girl rock band. On the film production side, Dina was the Co-Producer of the 2005 Academy Award-nominated feature documentary film entitled, *Tupac: Resurrection.*

For more information on Dina LaPolt or her firm, please log on to www.LaPoltLaw.com

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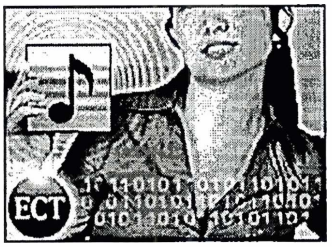
MUSIC & FILM

Record Industry Pushes Apple to Raise iTunes Prices



By Jennifer LeClaire
www.MacNewsWorld.com
Part of the ECT News Network
04/03/06 12:02 PM PT

Record labels make about 70 cents per download, and that's more profit than they make selling CDs, according to Apple CEO Steve Jobs. "If they want to raise the prices, it just means they're getting a little greedy," Jobs said at the Apple Expo in Paris in September.

The recording industry wants a bigger slice of the digital download pie. Some labels are pushing Apple (Nasdaq: AAPL) to change the 99 US cents pricing model it pioneered when it launched iTunes three years ago.

Apple has sold more than 1 billion songs since then, helping labels pad their declining CD sales. More than 350 million digital songs were sold in the U.S. alone last year, according to U.S. SoundScan. That's 1 1/2 times as many as were sold in 2004.

Apple's iTunes has the lion's share of the market -- about 80 percent, according to the company -- with Napster and RealNetworks' Rhapsody among those competing for the remaining share with a subscription-based pricing model.

"I hope that every customer, artist and music company executive takes a moment today to reflect on what we've achieved together during the past three years," said Steve Jobs, Apple's CEO. "Over one billion songs have now been legally purchased and downloaded around the globe, representing a major force against music piracy and the future of music distribution as we move from CDs to the Internet."

Record Labels Reflect

It seems the music companies have done plenty of reflecting. The record labels agreed to Apple's one-price-fits-all model three years ago. However, when Apple's license expires, the labels are expected to push for higher prices, especially for new releases.

Apple was not immediately available for comment on its licensing deals. Recording Industry Association of America (RIAA) spokesperson Amanda Hunter did not return calls seeking comment on the issue.

Record labels, though, have spoken out publicly in the past. Warner Music Group CEO Edgar Bronfman Jr. last fall suggested that Apple should not have a one-price-fits-all strategy. An emboldened Bronfman even suggested that Apple should give the labels a cut of iPod sales. Meanwhile, EMI Group CEO Alain Levy lobbied for higher prices for best-selling bands and discounts for lesser-known artists.

At the Core of the Issue

Record labels make about 70 cents per download, and that's more profit than they make selling CDs, according to Jobs. "So if they want to raise the prices, it just means they're getting a little greedy," Jobs said at the Apple Expo in Paris in September.

The recording industry's response reeks of "greed and ingratitude," agreed Envisioneering Group Director Richard Doherty.

"I would ask any of those labels to show a balance sheet that reveals what the artists have gotten of that money," Doherty told MacNewsWorld. "I would challenge the studios to open their balance sheets and show where they are losing money on this."

A Return to Illegal Downloading?

If there is anything in relation to digital downloads that concerns RIAA more than pricing, it's piracy. The association continues its push anti-piracy efforts around the globe. The question is, would raising download prices spur a movement back to illegal downloads? Or are consumers willing to pay more?

"The general feeling from our consumer interviews is that the market can't tolerate -- or need it have to -- a 100 percent premium, or even a 60 percent premium. The fact is, Apple Computer makes less money on the downloads than any of the labels it is dealing with, and even less than some of the credit card clearing companies," Doherty said. "If digital download costs are going up, the recording industry must be using a different Internet than the rest of us." ECT

▸ Next Article in Music & Film: Rhetoric Heats Up - Apple Denies iTunes Infringes Beatles' Trademark

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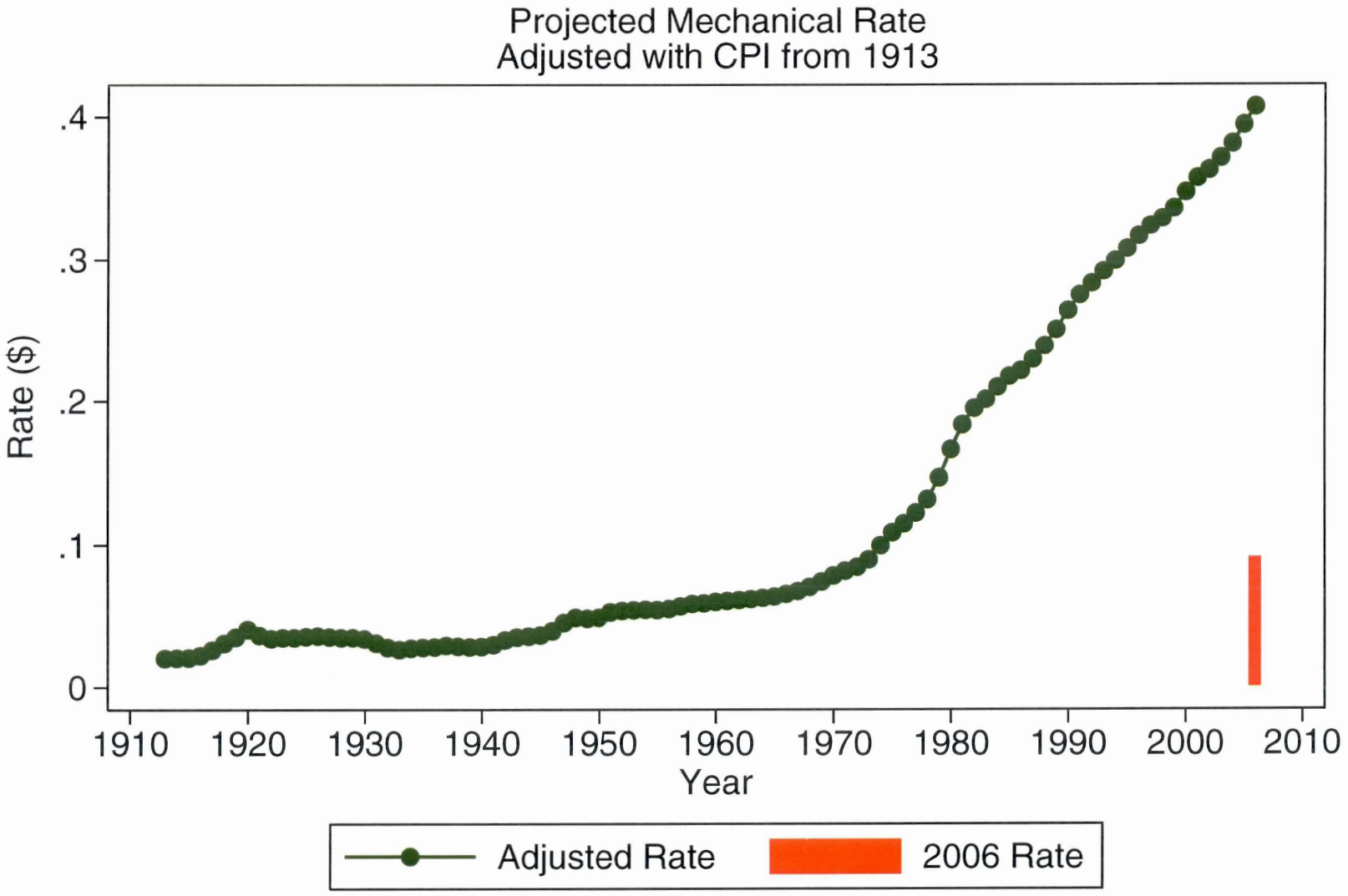

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